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1951.

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BARRISTER-AT-LAW.

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6 April. The Rt. Hon. Lord MacDermott of Belmont, Lord of Appeal in Ordinary, was appointed to be Lord Chief Justice of Northern Ireland.

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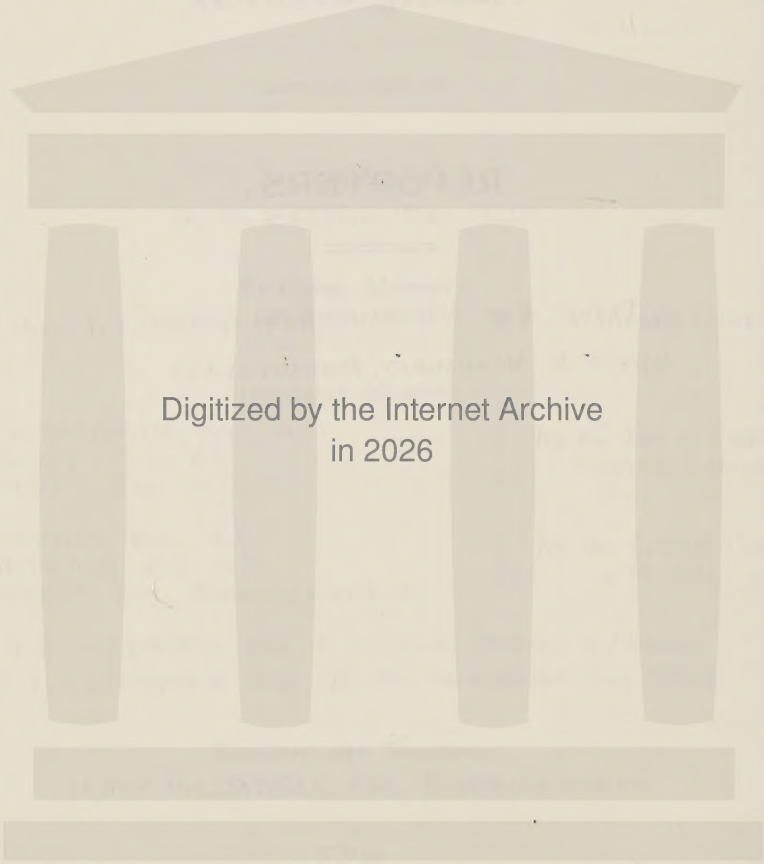

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IN

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WALSHE v. TAGGART (1).

Gaming—"Any place to which the public have or are permitted to "have access"—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4—*Summary Jurisdiction and Criminal Justice Act* (*Northern Ireland*), 1935 (25 & 26 *Geo.* 5, *c.* 13), *s.* 57.

The Vagrancy Act, 1824, as amended by the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, imposes penalties on every person playing or betting by way of wagering or gaming "in any street, road, highway or other public "place or in any place to which the public have or are permitted "to have access."

Held by the Court of Appeal (Andrews L.C.J. and Black L.J.; Porter L.J. dissenting) that private places to which the public have in fact gone without the permission or acquiescence of the owner are not within the meaning of the words "any place to which the "public have or are permitted to have access."

CASE STATED by the Recorder of Londonderry.

The respondent was convicted at Magherafelt Petty Sessions of betting by way of wagering with coins in a place to which the public have access contrary to s. 4 of the Vagrancy Act, 1824, as amended by s. 57 of the Summary Jurisdiction and Criminal Justice Act

(1) In the Court of Appeal before Andrews L.C.J. and Porter and Black L.JJ., October 25, 1950; January 12, 1951.

(Northern Ireland), 1935 (1). It was proved that the respondent and a number of other persons had entered on the private grounds of the Moyola Park Estate situate about 100 yards from and in view of a main road for the purpose of taking part and did take part in a game of chance known as Pitch and Toss. The part of the estate in question was approachable without any difficulty by members of the public. During the war years members of the public had been given permission to pass through the grounds of the estate, but about a year previous to the date of the alleged offence notices were published in the press and posted at various places in the grounds to the effect that the public were no longer permitted to enter the grounds and that persons doing so would be prosecuted.

On appeal to the Recorder of Londonderry it was found as a fact that the members of the public present on the occasion in question had not the permission of the owners of the property and that the owners had not acquiesced in their presence, but the learned recorder allowed the appeal on the ground that the words " any place to which the public have or are " permitted to have access " did not include or describe private places to which the public have in fact gone without the permission or acquiescence of the owner. This case stated for the opinion of the Court of Appeal raised the question whether the learned recorder was right in law in so holding.

Nicholson K.C. and *Lowry* for the appellant. One must first consider the mischief against which the Act

(1) Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, s. 57 (1) : " The following section shall be substituted " for section four of the Vagrancy " Act, 1824, as amended by subsequent enactments :—' 4. Every " ' person— . . . (*b*) playing or " ' betting by way of wagering or " ' gaming in any street, road, " ' highway or other public place or " ' in any place to which the public " ' have or are permitted to have " ' access, at or with any table or " ' instrument of gaming or any " ' coin, card, token or other article " ' used as an instrument or means " ' of such wagering or gaming at " ' any game or pretended game of " ' chance ; . . . shall be deemed a " ' rogue and vagabond. . . . '"

was aimed. It would seem that having regard to the word "public" that one object was to prevent members of the public being tempted to take part in illegal practices. The object of this provision is to suppress this particular type of gambling altogether and it must be construed so as to carry out that object as far as possible: *Haigh v. Town Council of Sheffield* (1). The wording of the paragraph was designed to cover (*a*) gaming on property which is public in the sense that the public cannot be excluded, and (*b*) gaming on property which is private, i.e., where the public may be excluded.

In *Turnbull v. Appleton* (2) the facts were similar to this case but the conviction stood on the finding that the public were permitted to have access. *Breslin v. Thomson* (3) and *Walker v. Reid* (4) are two cases which show that the Scots courts have construed "access" as meaning physical access, and that where "right of access" was meant that term was used. The language of a provision may be wide enough to embrace a situation which was not actively present to the mind of the draftsman: *Perrott v. Damolly Spinning Co.* (5).

The respondent did not appear and was not represented.

Cur. adv. vult.

ANDREWS L.C.J. (6) [after stating the facts continued]:

As the place where the game was played was private property it admittedly did not fall within the earlier words of section 4 (*h*)—"street, road, highway or other "public place"; and the sole question to be determined is whether it comes within the scope and true meaning of the remaining words—"any place to which the "public have or are permitted to have access." The resident magistrate, by whom the case was first heard at Magherafelt Petty Sessions on February 9, 1949,

(1) (1874) L.R. 10 Q.B. 102.
(2) (1881) 45 J.P. 469.
(3) [1910] S.C. (J.) 5.
(4) [1911] S.C. (J.) 41.
(5) [1947] N.I. 34, 37.
(6) Read by Black L.J.

held that the place at which the game was played did fall within these words, and convicted the respondent, but the learned recorder reversed this finding and dismissed the summons, stating this case for the opinion of the court as to whether he was right in law in holding that the words do not include or describe private places to which (as in the present case) the public have in fact gone without the permission or acquiescence of the owner.

Unfortunately, there was no appearance on behalf of the respondent on the hearing in this court, but we are satisfied that Mr. Nicholson, who appeared for the appellant, most faithfully discharged the duty which he undertook of bringing to our notice all matters and authorities which appeared to him to be relevant to the determination of the issue. Furthermore, we have the advantage of having set out for us in the case stated at some length and with perfect clearness the argument addressed to the learned recorder by Mr. Doris, the solicitor who appeared before him on behalf of the respondent, which argument was presumably accepted by the recorder when deciding in his favour.

The most material portion of this argument reads as follows: "Section 4 of the Vagrancy Act as amended "envisages three different types of places: (1) street, "road, highway or other public place; and this means "places used primarily as highways or thoroughfares; "(2) a place to which the public have access; and this "means a place to which the public have access as of "right; and (3) a place to which the public are per-"mitted to have access; and this means a place to "which the public have no access as of right, but in "respect of which they are permitted by the person "or persons capable of giving such permission to have "access." The place in the present case, it was further contended, could only be regarded as a "place "to which the public have access" if the true meaning of these words is a place to which as a matter of fact the public did resort; and that, if such was the true meaning, then there was no necessity to include in the section the reference to a "place to which the public

". . . are permitted to have access." These latter words would in such event be mere surplusage.

Whilst the case is a small one we have felt it necessary to give it much careful thought, and for my part I have come to the conclusion that the learned recorder's decision was correct in law and should be upheld. The relevant words of section 4 of the Vagrancy Act, 1824, as to the locality in which the offence might be committed were " any street, road, highway, or other " open and public places." This Act, when passed into law, applied only to England ; but section 4 of the Act, with certain amendments immaterial to our present enquiry, was extended to Ireland by the Prevention of Crimes Act, 1871, section 15. Two years later the scope of section 4 of the Act of 1824 was widened by section 3 of the Vagrant Act Amendment Act, 1873, by the addition of the words " or in any " open place to which the public have or are permitted " to have access " ; and it was also provided by section 2 that the Acts of 1873 and of 1824 should be construed as one Act. Such was the state of the law in England when *Turnbull v. Appleton* (1), to which I shall refer later, was decided.

The argument addressed to us by Mr. Nicholson and Mr. Lowry on behalf of the complainant and appellant may be briefly summarised. In the first place they pointed to the somewhat remarkable result which would follow from Mr. Doris's construction ; that the playing of this game in a place to which the public were permitted to have access would be an offence punishable under the section, whilst if the game were played in a place to which they had neither a right nor permission to go—where they were in fact trespassers—it would not be an offence within the section. They further contended that this was a section aimed at remedying a public mischief, its object being to protect the public against temptation ; and that accordingly, it should be given the widest interpretation in order the more effectually to accomplish this end.

(1) (1881) 45 J.P. 469.

Such arguments were directed more to principle and to the policy of the Legislature ; but Mr. Nicholson did not confine himself to this. On the strict reading of the section he submitted that there were only two, not three, categories of places referred to in it. The first was where the public played by way of gaming in a public place to which they had access and a right to go ; the second was a place to which the public had in fact access, though not as of right, or a place to which they were permitted to go. Thus, said Mr. Nicholson, did the Legislature cast the net wide. The criterion which it set was not whether the public went to the place as of right, but whether they were in fact there. Reliance was also placed in support of the twofold, rather than of the threefold division of places, upon the fact that the word " in " only appears twice in clause (*h*) of the amended section four, immediately preceding the words " any street " and " any place " ; and in this respect a comparison was made and a contrast drawn with clause (*c*) of the same section.

In my view, however, the arguments so submitted on behalf of the appellant cannot be allowed to prevail. The fact that trespassers on private ground who engage in such playing by way of gaming escape the penalty provided in the section is far from conclusive. Such parties could, of course, be made liable to other legal consequences for their illegal acts. Whilst it may have been to some extent the protection of the public from the temptation and bad example of gaming to which the sub-section was directed yet it was only in public places, or in places to which the public had a right to resort, that the public would naturally be expected to assemble. Against the submissions made on behalf of the appellant, there is also the strong argument already referred to that, if we ascribe to the words " place to which the public have . . . access " the wider meaning contended for, we render the words which follow disjunctively—" or are permitted to " have access " mere surplusage. If high authority be required against a construction involving such a result one might refer to the judgment of the Privy

Council in *Ditcher v. Denison* (1). In construing a legal document one ought always to suppose that every word is intended to have some effect or to be of some use. So also in *Auchterarder v. Lord Kinnoull* (2), Lord Brougham expressed it as his view that a statute is never supposed to use words without a meaning. Perhaps these words are somewhat too general if they are intended to cover such a case as is referred to by Coleridge J. in *R. v. East Ardsley* (3), where attempting to give a meaning to every word would make an Act of Parliament insensible, or would defeat the manifest intention of the legislature. The general principle is, however, well established, and in my opinion has very direct application to the present case.

One might also dwell, were it necessary to do so, on the equally well settled principle of strict construction in the interpretation of a criminal statute in order that one may be quite sure that the offence charged is within the letter of the law. I shall content myself, however, with referring to the judgment of Pollock C.B. in *Attorney-General v. Sillem* (4), and to the judgment of Black L.J. (then Black J.) in *Ministry of Agriculture for Northern Ireland v. Turtle* (5), in which he said: "It is a well established principle that if "there are two reasonably possible constructions "which can be given to penal sections of a Statute, "the Court ought to adopt the construction which "enables the defendant to escape the penalty. A good "modern instance of the application of this principle "will be found in the decision of the English Court of "Appeal in *Remmington v. Larchin* (6). As is said in "Maxwell on the Interpretation of Statutes, in a "passage quoted by Scrutton L.J. in *Remmington v. Larchin* (6): 'Where an equivocal word or ambiguous "'sentence leaves a reasonable doubt of its meaning "'which the canons of interpretation fail to solve, the "'benefit of the doubt should be given to the subject "'and against the Legislature which has failed to "'explain itself.'"

(1) (1857) 11 Moore P.C. 324, 337.
(2) (1839) 6 Cl. & F. 646, 686.
(3) (1850) 14 Q.B. 793, 801.
(4) (1863) 2 H. & C. 431, 509.
(5) [1946] N.I. 63, 79.
(6) [1921] 3 K.B. 404, 410.

I pass now to the case of *Turnbull v. Appleton* (1) which, though by no means conclusive of the present case, appears to be the only authority affording any assistance. A certain colliery company had a large field of 30 acres which they allowed the workmen and their families to use for recreation. Strangers were also allowed to come and play there, and did in fact come in very large numbers. One day Turnbull, the appellant, and others played at pitch and toss in the field; and upon a case stated Field and Manisty JJ. held that they were liable to be convicted under the Vagrant Act Amendment Act, 1873, section 3, for playing in a place to which the public were permitted to have access. The importance of this case lies only in this that both of the learned judges based their judgments on the words of the section—" place " to which the public are permitted to have access." They were concerned to determine if there was evidence to support the finding of the justices that the field was a place to which the public were " per- " mitted to have access "; and, holding that they had, they upheld the conviction. It would appear clear that if the construction contended for on behalf of the appellant in the present case is right, and if, accordingly, the words " have . . . access " do not mean " have access as of right," neither the justices nor the judges of the Queen's Bench Division would ever have found it necessary to hold that the public were permitted to have access; it would have sufficed for them to hold, as was conclusively established on the facts of that case, that the public in fact had such access in large numbers.

For these reasons I hold that the words in section 4 of the Vagrancy Act, 1824, as amended by section 57 (1) (*h*) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, do not include or describe private places to which the public have in fact gone without the permission or acquiescence of the owner. Accordingly, the question submitted to us should in my opinion be answered in the affirmative (2).

(1) (1881) 45 J.P. 469.

(2) [This judgment was not revised by Andrews L.C.J.—EDITOR.]

PORTER L.J.: The question for the court is whether the learned Recorder of Londonderry was right in law in holding that the words "in any place to which the "public have or are permitted to have access" in section 4 (*h*) of the Vagrancy Act,1824, as amended do not include or describe private places to which the public have, in fact, gone without the permission or acquiescence of the owner. The appellant was convicted at Magherafelt Petty Sessions on a charge that he was found betting by way of wagering with coins "in a place to which the public have access" contrary to section 4 of the Vagrancy Act, 1824, as amended by the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935. As appears from the arguments addressed to the learned recorder the case turned upon the meaning to be attributed to the word "access."

Mr. Doris for the respondent contended that "access" in the section means "access" as of right, and as the public had no right of access to the Moyola Park estate where the alleged offence took place, the section did not apply. For the Crown on the other hand it was submitted that it means access in fact or physical access, and since on the uncontradicted evidence of Constable Vaughan the place where the gaming occurred was a place "to which the public have "access" in fact, the section did apply.

The material words of the original section are: "Every Person playing or betting . . . in any Street "Road Highway or other open and public Place . . ." The Vagrant Amendment Act, 1868, section 3, amended and extended the operation of the section by the addition of the words "or in any place to which the "public have or are permitted to have access." This Act was repealed by the Vagrant Act Amendment Act, 1873, and for the original section as amended there were substituted the following words: "Every "person playing or betting by way of wagering or "gaming in any street, road, highway, or other open "and public place, or in any open place to which the "public have or are permitted to have access . . . The 1824 Act which applied to England only was

extended to Ireland and Scotland by the Prevention of Crimes Act, 1871.

Section 57 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, has virtually adopted the words of the 1873 Act with the omission of the word " open " in the two places where it occurs. I have set out the alterations made in the original enactment by the amending Acts for the purpose of shewing the various stages in the development of the section which has been very aptly described by Mr. Nicholson as the casting of a wider net for the purpose of protecting the public against idle and disorderly gamesters.

With regard to the earlier words of the section " any " street, road, highway or other public place " it has been suggested that the words " other public place " ought to be read *ejusdem generis* with the words " street, road, highway " and thus to be restricted to such places as are of a similar character, as for example, public lanes, passages, avenues, courts, etc.

It should, however, be observed that the words which occur in each of the earlier Acts of 1824, 1868 and 1873 are not " other public place " but " other " open and public place," words which would include public lanes and passages as well as highways, but are more appropriate and far more likely to be understood as a description of public parks, playgrounds and other open spaces to which the public have access as of right. That the Legislature did not intend to restrict the meaning of the words in the manner suggested by the application of the *ejusdem generis* rule, is a fair inference to be drawn from the object of the enactment, which was not passed for the purpose of preventing obstruction of the highway, but to punish " idle and disorderly persons and rogues and " vagabonds so far as relates to the use of instruments " of gaming," and, I think, persons of that description would find it more convenient to carry on their gaming in parks and other open places rather than in lanes and passages. In my opinion the genus which is indicated is that of open and public places—a much wider genus than that of highways. The use of the

word " open " as well as the avowed intention of the Legislature are strongly against the restricted meaning of the words. For some reason the word " open " has been omitted in section 57 of the 1935 Act, but I do not think that the language and the obvious intention of the earlier Acts can be ignored, nor can it be argued with any show of reason that our Legislature by the omission of the word intended to narrow the operation of the section.

In my opinion the words of the earlier Acts—" any " street road highway or other open and public place " —include all public places to which the public have access as of right, and this is the meaning which should be given to the words " other public place " notwithstanding the omission of the word " open."

The application of the *ejusdem generis* rule was discussed in *Hawke v. Dunn* (1), a case under the Betting Act, 1853, which is entitled " An Act for the " suppression of betting houses." The question was whether " Tattersall's Ring " in the Hurst Park Racecourse was a " place " which was used by bookmakers for the purpose of betting with persons resorting thereto within the meaning of section 1 of the Act. which provides that no *house office room or other place* shall be open kept or used for the purpose of betting with persons resorting thereto. Counsel for the bookmaker had contended that the doctrine of *ejusdem generis* was applicable and also that the Act was penal and therefore ought not to be extended beyond what it clearly was intended to cover. It was held by a strong court consisting of Hawkins, Cave, Wills, Wright and Kennedy JJ., that the Ring was a " place " within the meaning of the Act.

The same point was discussed in the Court of Appeal and the House of Lords in *Powell v. Kempton Park Racecourse Co.* (2). It was held that the decision in *Hawke v. Dunn* (3) was wrong, not however on the ground that the enclosure was not a " place," but that it was not a place opened, kept or used by the

(1) [1897] 1 Q.B. 579, 586.
(2) [1897] 2 Q.B. 242; [1899] A.C. 143.
(3) 1897 1 Q.B. 579.

owner or occupier for the purpose of betting with persons resorting thereto. The Earl of Halsbury L.C. said: "I think in this respect with Rigby L.J." (who in the Court of Appeal held that the enclosure was a "place"), "that any place which is sufficiently "definite, and in which a betting establishment "might be conducted, would satisfy the words of the "statute" (1). All the Law Lords concurred in this point, including Lord Hobhouse and Lord Davey who thought that *Hawke v. Dunn* (2) had been rightly decided. Lord James of Hereford said: "Whilst the "place mentioned in the Act must be to some extent "ejusdem generis with house, room, or office, I do not "think that it need possess the same characteristics; "for instance, it need not be covered in or roofed. It "may be, to some extent, an open space. But certain "conditions must exist in order to bring such a space "within the word 'place.' There must be a defined "area and so marked that it can be found and recog-"nised as the 'place' where the business is carried "on and the bettor can be found." (3).

I think that the speeches of the Law Lords assist in determining the meaning to be given to the words "other public place," and tend to support the conclusion at which I have arrived, rather than such a narrow construction as would restrict them to public lanes, passages, etc.

It may, however, be said that we are not concerned with the words "any street road highway or other "public place" but only with the succeeding words, and in particular with the words "in any place to "which the public have . . . access." In my opinion we must first of all find what is the true meaning of what are obviously the leading, and indeed, the original words of the section, before considering the intention of the Legislature in adding the words "in any place to which the public have or are permitted "to have access."

I have given my reasons for coming to the conclusion that the original words were intended to include all

(1) [1897] A.C. at 162.
(2) [1897] 1 Q.B. 579.
(3) [1897] A.C. at 194.

places to which the public had access as of right. There were, however, very many other places of public resort in which idle and disorderly persons might carry on their gaming and betting with equal convenience to themselves, and I may add, with equal danger to the public.

There are demesnes and mansions which by the generous permission of their owners are open to the public, either freely or on payment of a nominal sum. There are also many pieces of waste land, open spaces, unoccupied ground and vacant sites, which, though private property, are frequented by the public without any permission whatever from the owners. The words " any place to which the public have access " would seem also to include those parts of Crown property in the foreshore lying between ordinary high water and low water mark which are frequented by the public. We all know places of this kind around our coasts to which the public resort in large numbers during the summer months for recreation, bathing, games and amusements. To such places they have access in fact, but not access as of right nor by oral or written permission. They have, indeed, a right to use and pass over that part of the foreshore for the purpose of navigation and of fishing, but not for recreation, bathing, games or amusements of any kind. Since gaming and wagering could be carried on by idle and disorderly persons as easily on crowded beaches as in streets or roads, it seems to me that such places were probably intended by the Legislature to be included by the general words " any place to which " the public have access." However that may be, whether these words be taken by themselves in their ordinary and natural meaning, or whether they be considered in relation to the other descriptions of the " places " in the preceding words, I think it is equally clear that they apply to the place in the Moyola Park estate to which any member of the public could have gone without any difficulty.

Mr. Doris in an ingenious argument before the learned Recorder submitted that the section envisaged three different types of places--

(1) any street road highway or other public place—meaning thereby places used primarily as highways or thoroughfares ;
(2) places to which the public have access as of right ; and
(3) places to which the public are permitted to have access, but have no access as of right.

He contended that a place " to which the public " have access " could not mean a place to which the public did in fact resort, that such an interpretation would render the succeeding words " or are permitted " to have access " mere surplusage, and therefore the words " to which the public have access " must mean access as of right and not access in fact. I cannot agree with this construction. It seems to me to be open to very serious and indeed insuperable objections.

There is no surplusage when one considers that access as a matter of fact differs very widely from permissive access which implies access in fact, accompanied, or rather conditioned by, permission or licence from the owner. On the other hand, if the argument of Mr. Doris were accepted that access in the phrase " to which the public have access " means access as of right, then the principal and original words of the section " any street road highway or other public " place " whether taken in their restricted, or in what I consider their true and wider signification, would be entirely superfluous, because all these public places are places to which the public have access as of right. This in itself would seem to be an objection of sufficient weight to dispose of Mr. Doris's contention, but there are several others.

In serving the two disjunctive phrases the word access occurs only once, and it must be given the same meaning in each phrase. If it means access as of right in connection with the words " have access " it must mean access as of right in connection with the words " are permitted to have access," but permissive access differs greatly from, and is generally contrasted with, access as of right, and the difference was obviously present to Mr. Doris, who, according to the argument as reported, said that a place to which the public are

permitted to have access means a place to which the public have *no access as of right* but are permitted to have access. If access means access in fact when coupled with permission, I cannot see how it could have a different meaning in the simple phrase " to which the " public have . . . access." Another objection to the construction advocated by Mr. Doris is that it conflicts with what has been called the golden rule of interpretation, viz., that words in a statute are to be construed in their natural and ordinary sense unless that would lead to some absurdity, repugnance or inconsistency with the rest of the statute: *Vacher & Sons Ltd. v. London Society of Compositors* (1) per Lord Macnaghten. Access in its ordinary and natural sense means access in fact, or physical access, and when so read it involves neither absurdity nor inconsistency with the rest of the section. According to my reading of the section there are three classes of places: (1) places to which the public have access as of right, (2) places to which the public have access, but not of right nor by permission, and (3) places to which the public have access by permission. The contention advanced by Mr. Doris and accepted by the learned recorder leads to a striking absurdity in the operation of the section, which would apply to the Moyola Park estate as long as the public were permitted to have access to it, but would cease to apply with the publication of the notice withdrawing permission, with the extraordinary result that gamesters would be guilty of a criminal offence so long as they held the status of licencees, but as soon as they were divested of that status and became trespassers in the demesne they would thereby acquire complete immunity from the penalties imposed by the section.

We were referred to several cases relating to charges of indecent exposure, but they do not appear to me to have any bearing in the present case. In *Turnbull v. Appleton* (2), a case under section three of the 1873 Act (which I have cited) several persons were convicted of playing pitch and toss in a field belonging to a colliery company, which allowed its workmen and

(1) [1913] A.C. 107, 117. (2) (1881) 45 J.P. 469.

their families to use the field for recreation and bowling matches. Members of the public in large numbers used to resort to the field and were never turned away. The accused were charged with unlawfully playing by way of gaming in a place to which the public then had, and were permitted to have, access, with certain coin.

The relevant words of section three are " or in any " open place to which the public have or are permitted " to have access," and the justices held that the place was a public place to which the public were permitted to have access. The question of law upon which the case was stated for the opinion of the court was whether on the facts the field was a public place within the meaning of the Act to which the public were permitted to have access. Field J. said : " It was a question for " justices as reasonable men to judge from the evidence " whether this was a place to which the public were " permitted to have access. Probably at first the " land was intended to be confined exclusively to the " use of the workmen, but latterly its use had been " extended, and others were freely admitted. It may " be true that such third parties did not of right use " the field, and it might have required a deed under " seal to have conferred on them such a right. But " in point of fact third parties did go, and were not " turned away. That, I think, satisfies the words of " the statute, and the conviction was, in my opinion, " right."

Manisty J. agreed and said the only question for the court was whether there was reasonable evidence on which the justices might hold that the field was a place to which the public were permitted to have access, and added that it was just such a place as the Legislature had in view when the Act of 1873 enlarged the former description given in the 1824 Act.

So far as I can gather from the report there was no discussion on the word " access " in the phrase " any " place to which the public have access." Counsel for the appellants appears to have relied upon two points only : (*a*) that the section applied to public places but not to a private field, (*b*) that no permission

had been given to the public, but the court held against both contentions.

It may be said that if "access" means access in fact, there was no necessity for the court to discuss the question of permission because it was clear from the evidence that the public had access to the field. The court, however, was bound to deal with the question asked by the justices whether on the facts the public had permission and there is nothing in the judgments which would suggest that they gave any consideration to that part of the section which we have to construe.

It is, of course, a well settled rule that penal statutes ought to be construed strictly, and no person is punishable under a statute unless it is reasonably clear that the act of which he is accused is within both the letter and the spirit of the statute, and also if there are two reasonable constructions of the language that construction is to be adopted which is most favourable to the accused. "But," as James L.J. said in *Dyke v. Elliott, The Gauntlet* (1), "where the thing is brought "within the words and within the spirit, there a penal "enactment is to be construed, like any other instru- "ment, according to the fair common-sense meaning "of the language used, and the Court is not to find or "make any doubt or ambiguity in the language of a "penal statute, where such doubt or ambiguity would "clearly not be found or made in the same language "in any other instrument."

In my opinion the meaning placed by the learned recorder upon the words "any place to which the "public have access" is not the natural nor the reasonable meaning. It renders quite superfluous the words immediately preceding, viz.: "any street road "highway or other public place" which were the only places described by the 1824 Act, and even if it did not contravene the established rules of construction, I think that the court should lean strongly against an interpretation which involves the absurd and anomalous result which I have mentioned.

(1) (1872) L.R. 4 P.C. 184, 191.

For these reasons, in my opinion, the question asked by the learned recorder should be answered in the negative.

BLACK L.J. : The question for determination in this case is the meaning to be given to certain words contained in paragraph (*h*) of the section substituted by section 57 (1) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, for section four of the Vagrancy Act, 1824. This paragraph (*h*) makes it an offence to carry on a certain type of gambling " in any street road highway or other public place or " in any place to which the public have or are permitted " to have access." The offence in the present case was alleged to have been committed within the grounds of a private estate to which members of the public could apparently gain access without difficulty but which they entered without the permission or acquiescence of the owner. I think that counsel for the prosecution were correct in pointing out that upon the wording of paragraph (*h*) the places in which the offence might be committed were divided into two categories, first in any street road highway or other public place, and second in any place to which the public have or are permitted to have access. It was not contended that the place with which we are concerned in the present case fell within the first of these two categories. Accordingly the question is whether it falls within the words " any place to which the " public have or are permitted to have access." On the facts found by the learned recorder the place was not one to which the public were permitted to have access. Counsel for the prosecutor however argue that the words " any place to which the public have " . . . access " must be read as meaning any place to which the public in fact have access, and if this is the proper construction to be placed on the words, they submit that there can be no doubt upon the facts set out in the case stated that the public in fact had access to the place where the offence is alleged to have been committed. The recorder however accepted the argument that if the words " or are permitted to have

" access " are to have any meaning the words " to " which the public have . . . access " cannot simply " mean to which the public have access in fact " but must be given some narrower significance.

It appears to me that if the section simply spoke of " places to which the public have access " the natural meaning which one would give to such a phrase would be places to which the public in fact enjoy access. But in construing the paragraph the words " or are " permitted to have access " cannot be disregarded. It is a long-established principle of construction that " a statute ought to be so construed that, if it can be " prevented, no clause, sentence, or word shall be " superfluous, void, or insignificant." I quote from the passage from Bacon's Abridgment cited by Cockburn C.J. in *Reg. v. Bishop of Oxford* (1). As Lord Sumner observed in delivering the opinion of the Privy Council in *Quebec Railway, Light, Heat, and Power Company v. Vandry* (2) " effect must be given, " if possible, to all the words used for the Legislature " is deemed not to waste its words or to say anything " in vain." I cannot see any escape from the view that, if the words " to which the public have . . " access " are to be construed as meaning to which the public have access in fact, then the words " or are " permitted to have access " are quite superfluous. It is hard to believe that the Legislature added these last mentioned words without intending that they should add something to what had been dealt with by the earlier words of the paragraph.

One, therefore, inclines to attach, if possible, a narrower significance to the phrase " any place to " which the public have . . . access " than the wider meaning " any place to which the public have access " in fact." If a narrower meaning than this is to be given to the phrase then, coming as it does before the words " are permitted to have access," it must be construed as referring to places to which the public have a right of access superior to a mere permission. Mr. Nicholson, however, contends that such a construction would not enable us to escape from the

(1) (1879) 4 Q.B.D. 245, 261. (2) [1920] A.C. 662, 676.

difficulties of the paragraph. He submits that any place to which the public have a right of access would necessarily be a "public place" falling within the first category of places mentioned in paragraph (*h*), and that, accordingly, the construction suggested would render superfluous and meaningless the words "or in any place to which the public have . . . access," thus involving precisely the same difficulty as the construction claims to avoid. I am not convinced that this argument is well founded. There may well be places in private ownership to which the public have some right of access but which the Legislature may not have considered would fall clearly within the category of public places, especially in a penal section which, upon well recognized principles, the courts would be expected to construe strictly.

The case most closely in point to which we were referred is *Turnbull v. Appleton* (1), decided upon section 3 of the English Vagrant Act Amendment Act, 1873, a section practically identical in its wording with the paragraph (*h*) which we have to consider and from which indeed paragraph (*h*) is obviously copied. It is clear from the facts of that case that the field in which the gambling was there alleged to have taken place was a place to which beyond any question the public had access in fact, but the point which was argued and decided in the Divisional Court was whether there was evidence on which the justices were justified in holding that the field was a place to which the public were permitted to have access. From the fact that this point came up for argument and decision it would appear that the question whether the statute applied to every place to which the public had access in fact must have been regarded as at least a very doubtful one.

In my view the Legislature has left it in doubt as to what precisely is intended by the words "to which, "the public have access" when coupled with the additional words "or are permitted to have access." This being so and the statute being a penal one, then in the words cited from Maxwell on the Interpretation

(1) (1881) 45 J.P. 469.

of Statutes by Scrutton L.J. in *Remmington v. Larchin* (1), " the benefit of the doubt should be given " to the subject and against the Legislature which has " failed to explain itself." For, as Lord Simonds put it in *London and Northern Eastern Railway Company v. Berriman* (2), in a phrase which has since been quoted or referred to at least twice by Somervell L.J. in the English Court of Appeal, " a man is not to be put in " peril upon an ambiguity, however much or little " the purpose of the Act appeals to the predilection of " the court."

Accordingly I agree with the Lord Chief Justice that the learned recorder was right in law in holding that the words " or in any place to which the public have " or are permitted to have access " contained in paragraph (*h*) do not include private places to which the public have in fact gone without the permission or acquiescence of the owner.

Appeal dismissed.

Solicitor for the appellant : *Chief Crown Solicitor.*

S. M. M.

(1) [1921] 3 K.B. 404, 410. (2) [1946] A.C. 278, 313.

REX (McNAIR) v. JUSTICES OF THE COUNTY OF THE CITY OF BELFAST (1).

Licensing Acts—Premises destroyed by enemy action—Licensing certificate suspended—Removal to new premises—Application to petty sessions for order authorising carrying on of business at new premises—Jurisdiction—Excise Licenses Act, 1825 (6 *Geo.* 4, *c.* 81), *s.* 11—*Finance Act* (*Northern Ireland*), 1942 (6 & 7 *Geo.* 6, *c.* 14), *s.* 2.

S. 11 of the Excise Licences Act, 1825, empowers the excise authorities in the event of licensed premises being destroyed to authorise the licensee by endorsement on his licence or otherwise to carry on his business at other premises " in the same district or place " provided that he produces such authority from justices of the peace " as by law required in that behalf " to keep a common inn alehouse or victualling house in the premises to which he desires to remove.

Held (1) that the authority now required is a certificate granted at quarter sessions under the Licensing (Ireland) Act, 1833, that the applicant is entitled to receive a licence for the new premises.

(2) that the power to grant such certificate in respect of any proposed new premises is now fettered by the restrictive provisions of the Intoxicating Liquor Act (Northern Ireland), 1923, as modified by the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927.

(3) that the provisions of s. 2 of the Finance Act (Northern Ireland), 1942, do not affect the law in this respect.

In construing the statutory provisions relating to the licensing of premises for the sale of intoxicating liquor in Northern Ireland it is necessary to observe the distinction between the licence issued by the excise authorities and the certificate of the justices which authorises the excise authorities to issue a licence. In popular speech the certificate of the justices is often referred to as a licence and the confusion has crept into some modern Acts of Parliament.

Per Andrews L.C.J.: S. 2 (4) of the Finance Act (Northern Ireland), 1942, is obscure and legal interpretation of it with any degree of certainty is impossible.

Per Black L.J.: *Semble* that the words " district or place " in s. 11 of the Excise Licences Act, 1825, refer to the excise district.

APPEAL from an order of a Divisional Court of the King's Bench Division (Porter L.J. and Sheil J.) making absolute a conditional order of certiorari.

The appellant, Thomas Diamond, was licensee of a public house in Skipper Street, Belfast, which was

(1) In the Court of Appeal before Andrews L.C.J., Black L.J. and Curran J.; February 6, 7, 8, 20; July 31, 1950.

destroyed by fire during an air raid on May 4-5, 1941. On December 16, 1948, the Ministry of Finance certified pursuant to s. 2 (2) of the Finance Act (Northern Ireland), 1942 (1), that the business formerly carried on at Skipper Street had been temporarily discontinued by reason of war circumstances which included the destruction of the premises. In March, 1949, the appellant obtained a lease of premises at 627 Lisburn Road, Belfast, about three miles away from his former premises, and on March 16, 1949, he applied to a resident magistrate sitting in petty sessions for an

(1) Finance Act (Northern Ireland), 1942, s 2, sub-s. 2 :—

"Where the Ministry of Finance is satisfied, on an application being made to it for a certificate under this sub-section, that a business has been temporarily discontinued by reason of war circumstances, the said Ministry shall certify accordingly, and any such certificate shall state whether or not those circumstances included the destruction of the premises or serious damage thereto."

Sub-s. 3 :

"Where a certificate is given under the last preceding sub-section as respects a business carried on in any premises, the licensing certificate for any licence granted in respect thereof which was in force immediately before the discontinuance shall, subject as provided by sub-section (4) of this section, be, and be deemed to have been, in suspense from the time of the discontinuance until the time when either it is, or is to be deemed to have been, again in force for all purposes by virtue of the provisions of the Second Schedule to this Act in that behalf, or extinguished by virtue of the provisions of the said Schedule in that behalf, and the said Schedule shall have effect accordingly."

Sub-s. 4 :

"If during the period for which any licensing certificate is in suspense by virtue of the last preceding sub-section an event happens in which, but for the suspension, a certificate for the transfer or removal of the licence might have been granted or confirmed under the Licensing Acts, a certificate for such transfer or removal may be granted or confirmed either—

"(*a*) at the time at which, and to the person to whom, a certificate might have been granted or confirmed had the licensing certificate not been suspended ; or

"(*b*) after the expiration of the period of suspension, to any person to whom a certificate for the transfer or removal might have been granted or confirmed had the said event happened immediately after the expiration of that period."

order to authorise him to carry on business in the new premises on the ground that his former premises had been destroyed by fire and that the licence had been suspended by the certificate of the Ministry of Finance. No objection was taken to this application and the magistrate made the order asked for.

The prosecutor, Frederick H. McNair, owned two public houses at 346 and 703 Lisburn Road, Belfast, and he applied to the King's Bench Division and obtained a conditional order of certiorari to quash the order of petty sessions. At the hearing before the Divisional Court to make absolute the conditional order it was contended for the prosecutor, (i) that there was no jurisdiction in petty sessions to make the order, either by virtue of s. 11 of the Excise Licences Act, 1825 (1), in conjunction with s. 2 of the Finance Act (Northern Ireland), 1942, or otherwise; (ii) that the appellant was not a duly licensed person within s. 11 of the Act of 1825 since the certificate of the Ministry of Finance operated only to suspend the licensing certificate and not the licence; (iii) that the new premises were not in "the same District or Place" as the old premises within the meaning of s. 11 of the Act of 1825; and (iv) that if any removal order could be

(1) Excise Licences Act, 1825, s. 11:—

"Provided always and be it "further enacted . . . that in all "Cases in which the House or "Premises in respect of which "any Excise Licence is or shall "be granted shall be burnt down, "or otherwise destroyed, or "rendered uninhabitable by Fire "or other unavoidable Cause or "Accident, it shall and may be "lawful for the Commissioners "and Assistant Commissioners of "Excise, or Collector and Supervisor, or other Person or Persons "authorized to grant Licences "within the District or Place in "which such House or Premises "was or were situate, upon due "Notice thereof to him or them "in that Behalf given, to authorize and empower, by Indorsement on such Licence, or otherwise, as the Commissioners of "Excise shall direct, the Person "or Persons authorized to carry "on Trade or Business by such "Licence at the House or "Premises so burnt down or "otherwise destroyed or rendered "uninhabitable, to carry on such "Trade or Business at any other "and different House or Premises "in the same District or Place, "of which due Entry shall be "thereupon made by such Person "or Persons at the Time of such "Removal thereto; provided always, that where such licensed "Person or Persons as aforesaid "shall be a Person or Persons by

made in these circumstances application would have to be made to quarter sessions.

It was contended on behalf of the appellant, (i) that certiorari would not issue to review a decision of licensing justices; (ii) that a rival publican had no *locus standi* to apply for a certiorari; and (iii) that on the facts of the case the respondent was estopped from taking objection to the order by reason of his acquiescence in the transactions before the application.

The Divisional Court in a reserved judgment held that s. 11 of the Act of 1825 required an application to be made to quarter sessions, and furthermore that, following the decision in *R.* (*Slevin*) *v. Longford JJ.* (1), the appellant was not a duly licensed person. Porter L.J. also expressed the opinion that the new premises, being in the same petty sessions district, were within "the same District or Place" as the old premises, and that the acquisition of new premises by a publican could constitute an event for the purposes of s. 2 (4) of the Finance Act (Northern Ireland), 1942; but Sheil J. was of a contrary opinion on these two points.

The appellant now appealed to the Court of Appeal.

McSparran K.C., *Jones K.C.* and *Bready* for the appellant.

Patton K.C., *McVeigh K.C.* and *Stewart* for the respondent.

"Law required to be duly authorized by Justices of the Peace to keep a Common Inn, Alehouse, or Victualling House, it shall not be lawful for the Commissioners or Assistant Commissioners of Excise, or such Collector and Supervisor, or other Person or Persons authorized to grant Licences as aforesaid, to authorize or empower such licensed Person or Persons as aforesaid, unless such Person or Persons shall, besides giving such Notice as herein-before required, produce to such Collector and Supervisor, or other Person or Persons authorized to grant Licences as aforesaid, such Authority from Justices of the Peace, as by Law required in that Behalf, to keep a Common Inn, Ale House, or Victualling House, in the House or Premises to which such Person or Persons shall desire to remove, in consequence of such Fire or other unavoidable Cause or Accident as aforesaid."

(1) [1923] 2 I.R. 79.

ANDREWS L.C.J. : The facts of this case are so fully stated and the law applicable to it is so fully discussed in the judgments of my colleagues—more particularly in the judgment of Black L.J.—that I deem it unnecessary to do more than state in brief terms the conclusions at which I have arrived.

In the first place, I am clearly of opinion that the order of the Divisional Court making absolute the conditional order of certiorari quashing the order made by a resident magistrate sitting in petty sessions on March 16, 1949, must be affirmed. The said order of the magistrate authorised one Thomas Diamond to carry on the business of the sale of intoxicating liquors by retail at the premises known as 627 Lisburn Road, Belfast, to which premises the business formerly carried on at 13 and 15 Skipper Street had been transferred, consequent upon the said Skipper Street premises having been destroyed by fire during an enemy raid on the night of May 4-5, 1941. An order of this character is technically known as a removal order : and it is conceded that the only foundation for the jurisdiction to make such an order is contained in section 11 of the Excise Licences Act, 1825. From its very title it will be observed that this Act is purely an Excise Act. Section 11 takes the form of a proviso to section 10 by which, taking for sake of brevity its purport and effect from the marginal note, it was enacted that no one licence should authorise any person, except auctioneers and maltsters, to carry on his trade in more than one separate and distinct set of premises. The proviso contained in section 11 renders it lawful for the Commissioners and Assistant Commissioners of Excise or other persons authorised in all cases in which the premises, in respect of which any excise licence shall be granted, shall be burnt down or otherwise destroyed as therein mentioned, to authorise by indorsement on such licence or otherwise the carrying on of the trade or business at other premises in the same district or place ; but a further proviso in the section declares that in such a case as the present it shall not be lawful for such Commissioners, Assistant Commissioners or persons to grant licences as aforesaid

unless the licensed person shall produce to such excise authority as aforesaid such authority from justices of the peace as by law required in that behalf to keep a common inn, alehouse, or victualling house in the premises to which such person shall desire to remove. Parenthetically, I may say, that I have no doubt that the words of the section "as by law required" were intended to mean and should be interpreted as meaning "as required by the law which may be in "force at the time of the application." The obtaining of this "authority" from justices of the peace, which was doubtless mainly required by the legislature in order to ensure that the new premises were of suitable character, is accordingly a condition precedent to the exercise by the excise authorities of the jurisdiction conferred upon them under the section. I am in entire agreement with both my colleagues, for the reasons which Black L.J. has so fully stated, that this authority or licensing certificate of the justices of the peace can only be granted at quarter sessions; that the order of the resident magistrate was, accordingly, made without jurisdiction and that on this ground alone the conditional order must be made absolute and the appeal dismissed. It further appears to me to be clear that as the licensing code contains no other provision which expressly authorises justices to grant the requisite authority for the removal of a licence, the granting of the authority by the justices under section 11 must be regarded as in substance the granting of a new licensing certificate for the new premises; and, as such, it must in my opinion be subject to the restrictive provisions of the Northern Ireland Licensing Act of 1923 as modified by the amending Act of 1927.

I only wish to add a few words in regard to section 2 of the Finance Act (Northern Ireland), 1942, which was also relied upon by counsel for the appellant in support of the conditional order. The object of that section, as I read it, was not to provide any new and additional power of removal distinct from that contained in section 11 of the Act of 1825. In *R.* (*Slevin*) *v. Chairman of Quarter Sessions of Longford* (1) three

(1) [1923] 2 I.R. 79.

adjoining houses had been burnt down, one of which was licensed, the second a hotel, and the third a hardware shop. The licence, which of course, without renewal, only remains in force for a year, was allowed to expire after the destruction of the premises. When the owner subsequently rebuilt the hardware shop he applied for and obtained from the chairman of quarter sessions what was called a transfer (really a removal) of the licence to the new premises. A Divisional Court, consisting of Molony C.J., Dodd and Samuels JJ., directed a writ of certiorari to issue to quash the order granting the transfer on the ground that under section 11 of the Excise Licences Act, 1825, the Commissioners of Excise can only transfer an actual and operative licence. As Samuels J. said: "Section 11 . . . "contemplates . . . an application under it being "made within the current year of the licence." (1)

It was obviously to overcome or circumvent this state of the law, in the hardships which had arisen or would necessarily arise from the burning or destruction of licensed premises as the result of enemy action, that section 2 of the Finance Act (Northern Ireland), 1942, was passed, the scheme of the section being the substitution of a suspension of the licence, effected by means of a certificate of the Ministry of Finance, for what would otherwise have been an extinction of the licence. By the granting of such certificate the licence was kept alive, though the licensed premises had been destroyed and no business was being carried on in them. The licence so suspended was therefore capable of subsequent restoration, as also of extinguishment, in the manner provided in the 2nd Schedule to the Act.

The great difficulty which arises in regard to section 2 of the said Act is the unfortunate drafting of sub-section (4). I have read it and re-read it, both independently by itself and in connection with the other sub-sections of that section, as also in connection with the second schedule of the Act to which the said section refers. I have also considered the views expressed by my colleagues upon it. I am much impressed by what Black L.J. says in regard to the

(1) 1923 2 I.R. at 84.

origin of the sub-section which constitutes such a departure in its drafting from the corresponding provision of the Imperial Finance Act of 1942. But that, as appears from his judgment, does not solve the difficulties which arise under the section. Does "removal" in the section refer to, or at least include, a removal under s. 11 of the Act of 1825? What is the meaning of an "event" in the sub-section which is referred to as happening "during the period for which "any licensing certificate is in suspense"? It is the granting of the certificate of the Ministry, consequent upon the destruction of the premises by reason of "war circumstances," which creates the suspension. The destruction therefore precedes the suspense. How then can the "event" in sub-section (4), if it means destruction, happen during the period of suspense? Does it means, as would appear to be absurd, that there must be a second destruction of the premises to bring the case within the provisions of sub-section (4)? Or does it mean where destruction follows suspense attributable to some other form of "war circum-"stances"? Or, finally, does the word "event" bear a much wider meaning than destruction, and include, for example, merely a change of ownership of the premises?

No matter what interpretation one seeks to put upon the sub-section one is confronted with almost insuperable difficulties. Its interpretation appears to me to be a matter of pure speculation or conjecture, for we have no real help from any other part of the Act to guide us. In my opinion, legal interpretation with any reasonable degree of certainty being impossible, it is my duty not to engage further upon the profitless task of expressing without any degree of confidence a view which would in any event be purely obiter for the purpose of the present appeal. It is my respectful opinion that the true intent and meaning of Parliament in enacting the sub-section should be clarified and declared by new legislation which, if thought desirable, could be made of a restrospective character. Such legislation should be directed to a removal of the several doubts and real difficulties referred to by

Black L.J., in the judgment which he is about to deliver. The appeal must be dismissed with costs (1).

BLACK L.J.: This is an appeal by one Thomas Diamond against an order of the King's Bench Division dated November 2, 1949, directing the issue of a writ of certiorari for the removal into the King's Bench Division for the purpose of being quashed of an order made on March 16, 1949, by a resident magistrate sitting in petty sessions for the County of the City of Belfast, purporting to authorise and empower the appellant to carry on the business of the sale of intoxicating liquors by retail at the house and premises 627 Lisburn Road, Belfast, to which house and premises (as stated in the said order of March 16, 1949) the said business formerly carried on at 13 and 15 Skipper Street had been transferred, the Skipper Street premises having been destroyed by fire on May 4, 1941, and the licence held by the appellant for those premises having been suspended under the Finance Act (Northern Ireland), 1942, by a certificate duly issued by the Ministry of Finance for Northern Ireland.

The facts of the case are simple. The appellant was the owner and licensee of a public house situated at Nos. 13 and 15 Skipper Street near the centre of the City of Belfast. These premises were destroyed by enemy action during an air raid on the night of May 4 and morning of May 5, 1941. On December 31, 1948, the Ministry of Finance certified in accordance with the provisions of section 2 (2) of the Finance Act (Northern Ireland), 1942, that the business carried on in those premises had been temporarily discontinued by reason of war circumstances. On March 7, 1949, the appellant obtained a tenancy of the premises No. 627 Lisburn Road, Belfast and on March 16, 1949, he obtained from a resident magistrate sitting in petty sessions the order which is sought to be quashed in these proceedings. These premises, No. 627 Lisburn Road, are not in the immediate neighbourhood of the appellant's former premises in Skipper Street. They are situated on a totally different part of Belfast on a

(1) [This judgment was not revised by Andrews L.C.J.—EDITOR.

road leading out of the city, and are about three miles distant by road from the Skipper Street premises. The prosecutor, Frederick H. McNair, who is the owner of two public houses on Lisburn Road, one at No. 703 Lisburn Road and the other at No. 346 Lisburn Road, distant respectively 273 yards and 360 yards from the appellant's new premises No. 627 Lisburn Road, was naturally apprehensive that his trade in those two houses would be seriously interfered with by the granting of a licence for the sale of intoxicating liquors in premises situated almost midway between his two Lisburn Road houses. He accordingly applied for and obtained a conditional order of certiorari for the purpose of quashing the order of March 16, 1949, and this conditional order was made absolute by the order of November 2, 1949, against which the present appeal is brought. On the hearing before the King's Bench Division various points were taken on behalf of the present appellant. It was contended that certiorari did not lie in a case of this type, that in any case the prosecutor was not an aggrieved person, and also that for certain reasons alleged in the affidavits which were filed to show cause he was estopped from maintaining these proceedings. These contentions were rejected by the King's Bench, and counsel on behalf of the appellant did not seek to rely on them in this court. They confined their argument to the net proposition that the order of March 16, 1949, was a valid order entitling the appellant to carry on the business of the sale of intoxicating liquors by retail at the premises No. 627 Lisburn Road, or to obtain the necessary licence from the excise authorities authorising him to carry on that business. The appellant founds his claim upon section 11 of the Excise Licences Act, 1825, which makes provision for the removal of an excise licence to other premises when the premises in respect of which the licence was granted have been burned down or otherwise destroyed or rendered uninhabitable, and upon the Finance Act (Northern Ireland), 1942, which made certain provisions in regard to the suspension and restoration of licensing certificates where the business carried on in

licensed premises has been discontinued owing to war circumstances.

When considering the statutory provisions to which we were referred during the argument it is necessary to bear clearly in mind the distinction between the licence properly so called—the licence issued by the excise authorities upon which the licence duty is payable—and the certificate or authority granted by justices which authorises the excise authorities to issue a licence. In making provision in regard to the issue of licences for the sale of intoxicating liquor the Legislature has long taken the view that other matters than the mere raising of revenue must be taken into consideration. In the interests of public order and decency it has sought from early times to ensure that licences for the sale of intoxicants by retail should only be issued to persons fit to be entrusted with the conduct of such a business, and should not be granted in respect of unsuitable premises. The means which it has adopted for carrying out this policy is to provide that before the excise authorities can issue a licence authorising a person to carry on such a business he must first obtain a certificate or authority in a prescribed form from justices of the peace. This certificate has taken various forms under various Acts. Under some statutes it authorises the applicant to carry on a certain type of business in specified premises: under others it certifies that he is entitled to receive an excise licence in respect of the premises. But whatever be the precise form which the justices' certificate may take it has always been the law since the earliest statutes with which we are concerned in the present case, that before a person can receive an excise licence to sell intoxicating liquor by retail in any premises in Ireland he must first have obtained the necessary certificate or authority from the justices. Although this distinction between the actual licence issued by the excise authorities and the licensing certificate which must be obtained before a licence can be issued runs through the licensing code, yet in popular speech an application to a licensing court for the grant of a licensing certificate is often spoken of as an application

for a licence, and, as we shall see later, this confusion has crept into some modern Acts of Parliament. The distinction, however, is clearly recognized in sub-section (1) of the interpretation section (section 8) of the Finance Act (Northern Ireland), 1942.

The foundation of the appellant's claim to be entitled to obtain sanction for the removal of his licence from the Skipper Street premises to the premises No. 627 Lisburn Road is the proviso contained in the latter part of section 11 of the Excise Licence Act, 1825. It is conceded that this is the only statutory provision now in force in Northern Ireland under which the removal of a licence from one set of premises to another may be possible under circumstances such as those obtaining in the present case. The Finance Act of 1942 introduces no fresh power of removal beyond that contained in the Act of 1825 : its function is to provide for the suspension and restoration of licensing certificates which would otherwise have lapsed. It is, accordingly, necessary to examine somewhat closely the proviso in section 11 of the Act of 1825.

[His Lordship then read the proviso in s. 11.]

This proviso is obviously intended as a proviso to the immediately preceding section of the Act (section 10), which enacted that no licence should authorize or empower the licensee to carry on trade or business in more than one set of premises of which he shall have made lawful entry (i.e., with the excise authorities) to carry on his trade or business at the time of granting the licence. The proviso makes an exception when the premises in respect of which an excise licence is in force are burnt down or destroyed. The scheme of the proviso is simple. When licensed premises are burnt down or destroyed it authorizes the Commissioners of Excise or the official authorized to grant licences within the district or place in which the premises were situate to authorize the licensee (by endorsement on the existing licence or otherwise as the Commissioner shall direct) to carry on his trade or business at other premises in the same district or place. The proviso, however, is made subject to a

further proviso that where the licensee is a person required to be duly authorized by justices of the peace to keep a common inn, alehouse or victualling house it shall not be lawful for the excise authorities to authorize the removal of the licence unless the licensee shall produce to them such authority from justices of the peace, as by law required in that behalf, to keep a common inn, alehouse or victualling house in the premises to which the licensee desires to remove. In other words, where according to the law a justices' certificate to keep a common inn, alehouse or victualling house must be obtained before a person can receive an excise licence in respect of premises in which he proposes to carry on business, the licensee whose premises have been destroyed must obtain such a certificate in respect of the premises to which he intends to remove before he can obtain a transfer of his licence to those new premises. The necessary preliminary for a licensee proposing to remove was accordingly to obtain from justices the certificate mentioned in the section. What that certificate was I shall consider presently.

The Act of 1825 was a statute applying to the whole of the United Kingdom. So far as Ireland was concerned it was superimposed on a considerable body of previous legislation relating only to Ireland, and I think it is clear from the wording of the statute that the draftsman had in mind the previous legislation relating to England and Scotland rather than that relating to Ireland. Provision for a licensee removing from one set of premises to another was no new thing in Irish legislation. In section 7 of the Spirits (Ireland) No. 2 Act, 1815, power was given to divisional justices of the Castle Division in Dublin to allow licensees to transfer to other houses for the remainder of the licensing year, the situation of the new premises to be described in an indorsement on the licence. And in section 5 of the Irish Excise Licence Duty Act, 1819, there was a general provision that a licensee was minded to remove from the house mentioned in his licence to another house within the same town or city or within the same excise district he could surrender his licence and obtain a new licence for his new premises

on paying any difference between the licence duty payable in respect of the new premises and that payable in respect of the old, together with one shilling in the pound on the amount of such difference. But he had first to obtain the certificate of the two next resident justices of the peace that the new house was proper to be licensed for the sale of spirituous and other liquors by retail. Here a new licence was to be issued for the new premises, whereas under section 11 of the Act of 1825 the existing licence could be indorsed. But in each case a certificate of the justices had to be obtained before the new premises could be licensed. It is curious to observe that in the later section—section 11 of the Act of 1825—no provision is made for the payment of additional duty as had been made in the Act of 1819 in the event of the new premises being chargeable at a higher rate.

The authority from justices, which section 11 of the Act of 1825 required to be produced to the excise authorities by a person seeking to take advantage of the provisions of that section, was an authority to keep a common inn, alehouse or victualling house in the premises to which he proposed to remove. So far as I am aware there was no statute enabling justices in Ireland to give such a certificate. The draftsman of the Act had obviously in mind the form of the certificate granted at that time by justices in Great Britain. The Act then in force in England and Scotland with regard to the issue of licences was the Excise Licences Act, 1808. Section 7 of that Act provided that excise licences to sell intoxicating liquor by retail were not to be granted to any person who should not produce a licence or authority granted to him by justices of the peace or magistrates or other competent persons to keep a common inn, alehouse or victualling house, and the section went on to prescribe the form of the justices' authority which in terms empowered the licensee to keep a common inn, alehouse or victualling house, and to sell therein victuals and all such exciseable liquors as he should be licensed and empowered to sell under the authority and permission of any excise licence which should be duly granted by the Commissioners of Excise.

In Ireland the statutory provisions in force in 1825 with regard to the issue of justices' certificates were contained in the Intoxicating Liquors (Ireland) Act, 1815. The additional provision in the Spirits (Ireland) No. 2 Act, 1815, section 9, enabling licences to be issued to any persons whom any three magistrates residing within seven miles of the habitations of such persons thought proper persons to be entrusted with such licences had been repealed by section 13 of the Act of 1819. Section 30 of the Intoxicating Liquors (Ireland) Act, 1815, directed the justices to enquire in open court into the character of the person applying for a licence, and whether the house in which he proposed to sell spirituous liquors, &c., by retail was conveniently situated for the purpose and capable of and convenient for the sale of victuals and the accommodation of travellers and persons resorting thereto for food and provisions, and also to enquire whether the sureties proposed by the applicant were good for the sums they were to be bound in; and the section further directed that the justices' approbation of any such person and of the sureties offered and of the place and house or houses whereat the applicant desired to be licensed should be immediately entered in court in the Crown book and signed by at least two of the justices, and that thereupon the Clerk of the Peace should give the person entitled a certificate in the form prescribed in the section. The requirement that the licensee should give a bond was abolished by section 9 of the Act of 1825. The form of certificate prescribed in this section 30 of the Act of 1815 merely certified that the applicant was duly entitled to receive a licence for selling spirituous liquors, wine, beer, ale or porter, etc., by retail at a certain specified place during the licensing year. It said nothing about authorising him to keep a common inn, alehouse or victualling house.

How were the requirements of the Act of 1825 to be complied with in Ireland where there was no statutory authority for the issue by justices of a certificate in terms authorising a person to keep a common inn, alehouse or victualling house? Obviously the difficulty was felt to be an acute one, not, of course, by reason

of the provisions of section 11 of the Act, which would be only rarely resorted to, but because of sections 13 and 14 of the Act, which in effect provided that no excise licence for the sale of intoxicating liquor by retail for consumption on the premises should be granted unless the applicant should produce a certificate or authority from justices to keep a common inn, alehouse or victualling house. The preamble to the Licensing (Ireland) Act, 1833, after reciting that it was enacted by the Act of 1825 that no excise licence for the sale of beer, &c., by retail should be granted to any person who should not produce a certificate or authority from justices of the peace or magistrates or other competent persons to keep a common inn, alehouse or victualling house goes on to state that the laws for granting such certificate or authority by the justices of the peace and magistrates in Ireland had become confused, doubtful and complicated, and that the requiring of the said certificate or authority imposed great difficulties and hardships on persons applying to be so licensed. The Legislature accordingly superseded sections 13 and 14 of the Act of 1825, so far as regards Ireland, by the provisions in regard to the granting of justices' certificates contained in the Act of 1833, provisions with which we are still familiar. I have not been able to trace how, in fact, the matter was dealt with in Ireland between 1825 and 1833, but personally I have little doubt as to the course which ought to have been adopted. The certificates given by justices in Ireland under the Act of 1815 were designed to fulfil the same purpose as the certificates granted by justices in England under the Act of 1808; and in my view section 13 of the Act of 1825 in its application to Ireland ought to have been read as if the justices certificate therein referred to was the certificate granted by justices under the provisions of the Irish Act of 1815. The same observations would, of course, also apply to the mention in the concluding sentence of section 11 of the Act of the authority from justices to keep a common inn, alehouse or victualling house. Although the matter is perhaps not directly governed by the decisions of

the House of Lords in *Commissioners for Special Purposes of Income Tax v. Pemsel* (1), and *Lord Advocate v. Moray* (2), I venture most respectfully to think that the view which I have expressed on this point would have commended itself to the learned lords who delivered opinions in those cases.

The real question, however, is how we should interpret at the present day the requirement in section 11 of the Act of 1825 that a person seeking to take advantage of the provisions of that section must produce such authority from justices of the peace as required by law in that behalf to keep a common inn, alehouse or victualling house in the house or premises to which he desires to remove. Once the licensee obtained that authority or certificate the duty of the excise officials was largely, if not wholly, a merely ministerial one. The vital requirement was that the applicant should first obtain the necessary justices' certificate in regard to the new premises. Presumably the justices had already satisfied themselves that he was a fit person to hold a licence. But he was not to be allowed to remove to any premises that he might choose to pick upon. His choice, if he was given free rein, might fall upon premises in which no responsible authority could sanction the carrying on of a licensed trade. The object of the Legislature in requiring the production of the justices' certificate in respect of the new premises was clearly to secure that the licence could only be transplanted to premises suitable to be kept as a common inn, alehouse or victualling house, or, to use a more modern phrase, suitable for carrying on the trade of a licensed victualler. The authority which the section requires to be produced to the excise authorities is such authority from justices of the peace as is by law required in that behalf. This, I interpret as meaning the ordinary authority or certificate required by Act of Parliament to be obtained from justices to carry on the specified business in the new premises. There would have been no difficulty in 1825 to say what this authority was in Great Britain. It was the authority prescribed by section 7 of the

(1) [1891] A.C. 531. (2) [1905] A.C. 531.

Excise Licences Act, 1808. And as I have already indicated I am of opinion that in order to render the section operative and effectual in Ireland the authority, which under the section it would have then been necessary to produce to the excise authorities to secure a removal of a licence in this country, would have been a justices' certificate issued in respect of the new premises under section 30 of the Intoxicating Liquors (Ireland) Act, 1815.

What, then, is the authority from justices which must be produced at the present day in order to secure a removal of a licence under section 11 ? Since 1825 various modifications have taken place in the procedure to obtain justices' certificates and in the form of those certificates. Their purport and object still, however, remain the same. No person can obtain an excise licence in respect of any premises unless he first obtains a justices' certificate, and the function of the certificate is to certify that the applicant is a fit person to hold such a licence and that the premises are suitable for carrying on the licensed trade. Where a person applies to the excise authorities under section 11 to authorise a removal those authorities must, in my opinion, ask themselves whether an authority from justices is required by law to keep a common inn, alehouse or victualling house in the new premises, and if the answer is in the affirmative they must require the applicant to produce an authority of this kind entitling him to carry on such business in the new premises. Whatever may be the precise meanings to be given to the words " common inn " and " victualling house " undoubtedly a justices' certificate is required by law before a person can be entitled to carry on an alehouse in any premises in Northern Ireland. The excise authorities must, accordingly, require the production of such a certificate in respect of the new premises before authorising a removal to those new premises. The justices' certificate now necessary for the issue of a licence in respect of premises which were not licensed during the preceding year is the certificate set out in section 5 of the Licensing (Ireland) Act, 1833, and, in my opinion, any person

seeking a removal under section 11 of the Act of 1825 must apply for and obtain this certificate. The procedure which a person seeking such a certificate must follow is set out in sections 2 to 4 of the Act of 1833. The application is an application to justices in quarter sessions, and under section 4 of the Act it is the duty of the justices to consider, examine into and adjudicate upon any objections which may be made to the granting of the certificate, whether grounded upon the character, misconduct or unfitness of the applicant, the unfitness or inconvenience of the house or place, or the number of previously licensed houses in the neighbourhood. The certificate is the certificate required to be procured by a person seeking a new licence for premises not previously licensed, and it would appear that on becoming possessed of such a certificate the applicant would not merely be entitled to require a removal of his existing licence to the new premises under section 11 of the Act of 1825, but might, if he preferred, apply on the strength of the certificate to the excise authorities for a new licence for those premises under section 6 of the Act of 1833.

This, in my opinion, is the natural view to take of the application of the provisions of section 11 of the Act of 1825 at the present day. The only other possible views would seem to be either, on the one hand, that the excise authorities have now no jurisdiction at all to grant a removal of a licence under the section inasmuch as justices have no jurisdiction either to issue the precise certificate specified in the section, or to issue the corresponding certificate obtainable in Ireland in 1825 since the Act of 1815 has long since been repealed, or, on the other hand, that since the certificate mentioned in the section is not obtainable the excise authorities may authorise a removal of the licence without requiring the production of any certificate at all. No serious attempt, however, was made to support either of these views during the argument.

I hold, therefore, that before authorising a removal of a licence under section 11 of the Act of 1825 the excise authorities must require the applicant to obtain

and produce a justices' certificate in respect of the new premises issued under the provisions of sections 2 to 4 of the Act of 1833, in other words a certificate which would entitle the applicant to obtain a licence for those new premises. But the matter does not, in my opinion, rest there. Under modern statutes an applicant has a further difficulty to encounter before obtaining the removal of a licence to previously unlicensed premises. The policy of the law during the last half century has been to restrict drastically any extension of facilities for drinking. I need not refer in detail to the Licensing (Ireland) Act, 1902, which has now been repealed. The present statutory provisions are contained in section 9 of the Intoxicating Liquor Act (Northern Ireland), 1923, as modified by section 3 of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927. The effect of these sections is that, except in certain specified circumstances, no licence can be granted for the sale of intoxicating liquor except for premises which were licensed at the date of the passing of the Act of 1923, or which were licensed at any time since January 1, 1920. This veto on the granting of licences in respect of premises not previously licensed is expressed in wording of complete generality "no licence "shall be granted." It will be found in paragraph (*a*) of section 9 of the Act of 1923. In paragraph (*b*) (now replaced by section 3 (4) of the Act of 1927) an exception is made for the case where a licence is extinguished by reason of the expiration of the lease of the premises to which it is attached: in that case the licensing authority may grant a licence for suitable premises in the immediate vicinity. But no exception is made for the circumstances contemplated by the proviso to section 11 of the Act of 1825. The Act of 1825 is not mentioned in the Act of 1923 or the Act of 1927. It may be that the Legislature overlooked it or it may be that it had been found that section 11 was so rarely availed of that Parliament considered that it need not be expressly provided for. However this may be, under section 11 the excise authorities can only grant a removal of a licence to a person who produces an authority from justices as by law required

in that behalf to keep an alehouse in the premises to which he proposes to remove. How can justices grant such a certificate in respect of premises for which the Legislature has forbidden the granting of a licence? In construing paragraph (*a*) of section 9 of the Act of 1923 it is not easy to decide whether the word licence is there used as meaning the excise licence or as meaning the justices' certificate. Under section 13 expressions not specifically defined in the Act are to have the same meaning as in the Licensing (Ireland) Acts, 1833 to 1900, unless the context otherwise requires. This leads us to section 37 of the Licensing (Ireland) Act, 1874, which defines licence as the excise licence. In paragraph (*c*), however, of section 9 of the Act of 1923 the word is used twice as meaning the licence or certificate granted by the licensing authority. In paragraph (*b*) it is used first as meaning the excise licence and subsequently as meaning the licensing authority's certificate. If where used in paragraph (*a*) it means the certificate granted by the licensing authority, then the Act expressly forbids licensing authorities to grant such certificate as would be required to be produced under section 11 of the Act of 1825 except in very limited classes of cases, so limited in fact as to be almost negligible. If, however, it means an excise licence the same result follows. By indorsing a licence under section 11 the excise authorities are in fact granting a licence to carry on business in the new premises. And in any case since an excise licence only remains in force for a year, it would be necessary after the end of the year during which the removal took place for a fresh licence to be granted by the excise authorities for the carrying on of the business during the ensuing year. It is in evidence before us that the premises No. 627 Lisburn Road were not licensed at the date of the passing of the Act of 1923 or since January 1, 1920. Accordingly I am of opinion that the law, as it now stands, precludes the appellant from obtaining a valid removal of his licence from the premises in Skipper Street to the Lisburn Road premises. This conclusion is not in any way affected by the provisions of the Finance Act (Northern Ireland), 1942.

Before leaving the Act of 1825 reference should perhaps be made to a point which was much discussed before us, the meaning of the words " district or place " in the section. One suggestion is that the words are used in a loose popular sense, another is that they mean the district of the licensing justices, and a third that they refer to the district of the excise officials who are charged with the task of collecting the excise duty and of issuing the licences. The first suggestion would appear to involve considerable difficulties. What is the criterion by which it is to be decided whether two sets of premises are situated in the same district or place, if those words are simply used in their popular significance ? Would No. 627 Lisburn Road be said to be in the same district or place as Nos. 13 and 15 Skipper Street ? And in a case of doubt who is to decide the question ? As regards the second suggestion is the district the county or the quarter sessions division ? Under the English Licensing (Consolidation) Act, 1910, section 24, a special removal of a justices' licence may be authorised to any premises within the same licensing district and an ordinary removal to any premises within a licensing district in the same county. But these are express statutory provisions and the subject matter is not the excise licence as in section 11 of the Act of 1825 but the justices' licence. In section 11 I can see little to point to the district or place as meaning the district of the licensing justices. With regard to the third suggestion, I should think that in 1825 there was probably no great difficulty in Ireland in obtaining a new licence for suitable premises. So far as I am aware it was not until the Act of 1833 that the number of previously licensed houses in the neighbourhood was made a statutory ground of objection to an application for a certificate for a new licence, and even then, according to the decision in *R.* (*Perry*) *v. Tyrone JJ.* (1), if no actual objection was made the justices could not refuse the application. Accordingly, as I see it, the real value of the proviso to section 11 of the Act of 1825 was to enable the licensee to carry on for the remainder

(1) (1903) 38 I.L.T.R. 26.

of the licensing year in his new premises without having to take out a fresh licence and pay a fresh licence duty. Some administrative difficulty might possibly arise in the excise offices if the licence duty had been paid in the district of one collector, and if, after the removal, the licence was to be actually operative in the district of another collector. The only reason, so far as I can see, for confining the removal to any particular district or place would be to prevent some difficulty of this kind. I am therefore disposed to think that the words district and place, as used in section 11, very possibly refer to the excise district, so that the provision in the section empowering the collector or supervisor, or other person authorized to grant licences within the district or place within which the old premises were situate, to authorize a removal to other premises in the same district or place should be read as empowering a collector or supervisor to authorize removals to premises situated anywhere in his own district. We were informed that the whole of Northern Ireland is now constituted a single excise district. If then the true meaning of district and place as used in the section is the excise district and if there were no obstacles in the way such as section 9 of the Act of 1923, it would be possible under the Act of 1825, upon the destruction of a small public house in some remote and unfrequented country district to seek a removal of the licence to first class premises in a flourishing district of Belfast. This would make a serious gap in our strictly drawn licensing code, and could I think be relied upon as affording strong support for the view that the effect of the Act of 1923 upon a proposed removal under s. 11 of the Act of 1825 is that such a removal can nowadays only be effected subject to the over-riding provisions of section 9 of the Act of 1923.

In the view which I have taken of the effect of the Act of 1923 upon the appellant's attempt to obtain a removal of his licence to the Lisburn Road premises, it becomes unnecessary for me to express any concluded opinion upon the very difficult, and, to my mind, the almost purely academic question of the bearing of the provisions of the Finance Act (Northern Ireland),

1942, upon applications for the removal of a licence under section 11 of the Act of 1825. The relevant portions of the Act of 1942 are section 2 and the Second Schedule. Section 2 (1) provides for relief from excise duty on liquor licences where the business has been temporarily discontinued by reason of any circumstances directly or indirectly attributable to the war (in the Act referred to as " war circumstances "), and the following sub-sections of section 2 and the Second Schedule contain provisions in regard to the suspension and restoration of licensing certificates when a licensed business has been temporarily discontinued through war circumstances. Section 2 (2) provides that the Ministry of Finance may give a certificate that a business has been temporarily discontinued through war circumstances and sub-section (3) enacts that, when such a certificate is given, the licensing certificate for any licence in force immediately before the discontinuance shall be in suspense until the time when it either is or is to be deemed to have been again in force by virtue of the provisions of the Second Schedule to the Act or is extinguished by virtue of the provisions of that Schedule. These sub-sections follow closely the wording of sub-sections (1), (2) and (3) of section 10 of the Finance Act passed by the Imperial Parliament in 1942, using, however, the term " licensing certificate " where the Imperial Act says " justices' licence." Section 10 (4) of the Imperial Act enacted that during the suspension of a justices' licence the provisions of the English Licensing (Consolidation) Act, 1910, as to the transfer and removal of justices' licences should still have effect in relation thereto, subject, however, as respects transfers to certain provisions in Part I of the Sixth Schedule to the Act. Accordingly the provisions in regard to transfers contained in sections 22, 23 and 25 of the Act of 1910 and the provisions in regard to removals contained in sections 24, 26 and 27 of that Act were made still applicable to justices' licences while they were in suspense. By reason of the differences between the licensing legislation in England and that in Northern Ireland this sub-section

(4) of the English Act could not be adapted without considerable alteration to Northern Ireland circumstances. Accordingly in place of it we find quite a different sub-section (4) in section 2 of our Act. This sub-section reads :—

" If during the period for which any licensing " certificate is in suspense by virtue of the last " preceding sub-section an event happens in which " but for the suspension, a certificate for the transfer " or removal of the licence might have been granted " or confirmed under the Licensing Acts, a certi- " ficate for such transfer or removal may be granted " or confirmed either—

" (*a*) at the time at which, and to the person to " whom, a certificate might have been " granted or confirmed had the licensing " certificate not been suspended ; or

" (*b*) after the expiration of the period of sus- " pension, to any person to whom a certi- " ficate for the transfer or removal might " have been granted or confirmed had the " said event happened immediately after the " expiration of that period."

The greater part of the argument addressed to us upon the provisions of the Act of 1942 was in regard to the bearing of this sub-section (4) of section 2 upon a case like the present. The English sub-section (4) deals with the removal of licences. There is no difficulty as to what is meant by the word removal in this English sub-section : it obviously refers to ordinary removals and special removals dealt with in sections 24, 26 and 27 of the Act of 1910. In the legislation in force in Northern Ireland, however, the only provisions, so far as I am aware, relating to the removal (properly so called) of a licence are those contained in section 11 of the Act of 1825. One would prima facie assume that the removal mentioned in section 2 sub-section (4) of the Northern Ireland Act of 1942 was a removal in this sense, a removal in pursuance of the provisions contained in section 11. Very possibly this was the removal intended to be referred to in the sub-section. The wording of the

sub-section, however, gives rise to undoubted difficulties. In terms it purports to deal with the case in which but for the suspension a certificate for the removal of the licence might have been granted under the Licensing Acts. The Licensing Acts are defined in section 8 (1) of the Act as meaning, unless the context otherwise requires, the Licensing (Ireland) Acts, 1833 to 1900, the Intoxicating Liquor Act (Northern Ireland), 1923, and the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927. The Act of 1825 is not included in this definition. Accordingly a certificate for removal under that Act is not in terms provided for under section 2 (4) of the Northern Ireland Act of 1942 according to the wording of that sub-section in the Statute Book. It is not as though the Legislature in passing the Act of 1942 had overlooked the existence of the Act of 1825; for, as was pointed out during the argument, the Act of 1825 is specifically referred to in section 7 of the Act of 1942, the section which immediately precedes the definition section. Accordingly it has been suggested that the removals intended to be dealt with in section 2 (4) are not removals under the Act of 1825 but transactions such as those provided for under section 3 (4) of the Act of 1927 where, upon the extinction of a licence by reason of the expiration of a lease, the licensing authority is empowered to grant a licence for suitable premises in the vicinity or those authorized by section 3 (5) of the same Act, where in the case of the business of a restaurant being transferred to other premises the licensing authority may grant a certificate authorising the issue of a licence for suitable premises in the immediate vicinity. In such cases the transaction might ordinarily be spoken of as the removal of a licence from the old house to the new, although what will be issued by the excise authorities in either of these cases will be a new licence. This gives a possible interpretation to the word removal in sub-section (4). But it seems to me that it would be somewhat odd to find Parliament legislating in 1942 for very exceptional cases such as these, and omitting to deal with what must then have been the much more common case of the

publican whose premises had been destroyed in the air raids and was desirous of transferring his business to other premises, especially as the corresponding legislation of the Imperial Parliament, upon which section 2 (4) of the Northern Ireland Act was obviously based, had clearly provided for such cases. On the whole, but with the hesitation which I think is justifiable on the part of one attempting to construe this difficult sub-section, I incline to the view that notwithstanding the qualifying words in section 2 (4) " might have been granted under the Licensing Acts " it is perhaps safer to regard the word removal as used in the sub-section in its normal sense of a removal under the provisions of section 11 of the Act of 1825. And indeed it might perhaps be said that in strictness the certificate authorising a removal under s. 11 of the Act of 1825 could properly be spoken of as a certificate granted under the Licensing Acts, for if the view which I have already indicated is correct the authority from justices which a licence holder must produce to the excise authorities in order to obtain a removal under s. 11 is now a certificate under s. 5 of the Licensing (Ireland) Act, 1833.

But even if this is so and if section 2 (4) is to be regarded as intended to make possible the removal of a licence under the Act of 1825 while the licensing certificate is in suspense, nevertheless it appears that the great majority of owners of licensed premises destroyed in the air raids are faced with another difficulty upon the wording of the sub-section if they seek to rely upon it in applying for a certificate for the removal of their licences. The case and the only case which section 2 (4) purports to deal with is where *during the period for which any licensing certificate is in suspense* under section 2 (3) an event happens in which, but for the suspension, a certificate for the removal of the licence might have been granted. The event in which a removal might be authorised under section 11 of the Act of 1825 is the event of the licensed premises being burnt down or otherwise destroyed or rendered uninhabitable by fire or other unavoidable cause or accident. Such an event did not happen in the present case

during the period while the licensing certificate was in suspense. The destruction of the premises was the event which gave occasion for the licence to be put in suspense. It might perhaps have been that if the attention of Parliament had been called to the point they might have worded the sub-section to cover such a case as the present. But they have not done so. In section 2 (4) they have in the clearest terms dealt only with the case of an event happening during the period while the certificate is in suspense. If the sub-section is to be extended to the case of an event happening at an earlier period this could only be done by legislation. On the assumption then that removal in section 2 (4) means removal under the Act of 1825 the sub-section as it is worded could have no operation in regard to the removal of a licence which had been attached to premises destroyed by enemy action, save only in the very exceptional case where at some time prior to the destruction of the premises the licensing certificate had already been put into suspense by reason of some other war circumstance, such, for example, as the requisitioning of the premises.

It accordingly appears that on any view it is difficult to elicit a satisfactory construction and a satisfactory result from section 2 (4) in so far as it relates to applications for removal consequent upon the destruction of premises. Since the hearing, however, Curran J. has made a suggestion in regard to the section which I find quite attractive. He points out that without the references to removal in sub-section (4) the sub-section is clear and intelligible, and that the references to removal might possibly be intrusions which may have crept into the sub-section through some mistake or misunderstanding and which, what ever meaning we give to them, lead to unsatisfactory and capricious results. He suggests that if section 2 (3) and the fourth paragraph of the Second Schedule to the Act are read together, without any reliance whatever being placed upon sub-section (4), we find a simple and intelligible scheme enabling the licensing certificate to be put into suspense if the premises are destroyed by enemy action and providing

for it being brought into force again if and when a removal of the licence is authorised. This, as I have said, I find quite an attractive suggestion but I do not think that it is without its difficulties. It postulates the possibility of an application for the removal of a licence being made while the licensing certificate is in suspense. Now it is quite clear from the wording of section 11 of the Act of 1825 that the process of removal thereby provided for could only operate while there was actually in existence an excise licence relating to the destroyed premises. If the licence was allowed to expire at the end of the licensing year so that there was no longer any excise licence in actual existence an application under section 11 for the removal of the licence could not then be sustained. This has been expressly decided in *R.* (*Slevin*) *v. Longford JJ.* (1). In the present case the removal was sought long after the expiration of the licence which was in force at the time of the destruction of the Skipper Street premises. And I imagine that it will be found in the case of most of the licensed premises destroyed in Belfast during the air raids that before any application was made for a removal the existing licence either expired at the end of the licensing year or was surrendered during the course of that year under the provisions of section 3 (1) of the Finance Act (Northern Ireland), 1936, and section 2 (1) of the Act of 1942. In order that an authorisation for the removal of a licence as contemplated by the fourth paragraph of the Second Schedule of the Act of 1942 should be obtainable after the expiration of the actual licence attached to premises destroyed in the air raids, I think it would be necessary to have some express statutory provision enabling such authorisation to be obtained while the licensing certificate is in suspense. In England provision has been made for the authorisation of the removal of justices' licences while they are in suspense by section 10 (4) of the (Imperial) Finance Act, 1942, and the position in Scotland is provided for by paragraph 10 of the Sixth Schedule to that Act. It was probably one of the aims of section 2 (4) of the Northern Ireland

(1) [1923] 2 I.R. 79, 109.

Act of 1942 to make similar provision for Northern Ireland. Whether and to what extent it succeeded in achieving that aim is a matter with which I have already attempted to deal. If, however, the references to removal in sub-section (4) are disregarded and reliance is placed only upon sub-section (3) and the fourth paragraph of the Second Schedule. I fear that I cannot find any provision in the Act altering the position established by *Slevin's* case (1) that an application for a removal under the Act of 1825 can only be maintained during the currency of an excise licence actually in existence for the premises which were destroyed. I think an express statutory provision is necessary (such as that contained in section 10 (4) of the Imperial Act of 1942 or in paragraph 10 of the Sixth Schedule to that Act) to permit the authorisation of a removal under the Act of 1825 during a period while there is no licence actually in existence.

But whatever may be the solution of these difficult questions in regard to the meaning and effect of section 2 of the Act of 1942, I am satisfied that on the law as it stands under our licensing code a licence could not be granted for the premises No. 627 Lisburn Road save in very exceptional circumstances which do not exist in the present case, and certainly that the certificate authorising the grant of such a licence could not be given in petty sessions. I am accordingly of opinion that the order of the King's Bench Division making absolute the conditional order of certiorari was right and that the appeal from that order should be dismissed.

Curran J.: I agree that this appeal should be dismissed on the ground that the only appropriate procedure under section 11 of the 1825 Act is an application to quarter sessions for a certificate authorising the applicant to obtain a licence for the premises to which he desires to remove his business. Section 11 of the 1825 Act does not purport to give any additional jurisdiction to justices. To quote Dodd J. in *R. (Slevin) v. Longford JJ.* (2): "the Act of 1825 was an Excise "Act, and did not purport to affect, much less dispense

(1) [1923] 2 I.R. 79. (2) Ibid. 82.

" with, the power of the licensing authority." I have been unable to find any statutory provision empowering justices to grant a certificate or other authority for the removal of a licence as distinct from the grant of a licence for the premises to which it is proposed to remove a business. I agree with Black L.J. that it necessarily follows that the restrictions on the granting of licences contained in the Intoxicating Liquor Act (Northern Ireland), 1923, as modified by the Act of 1927, must apply. In these circumstances the preservation by the Finance Act (Northern Ireland), 1942, of the right to apply for removal, if indeed such right is preserved by the provisions of that Act, can bring little consolation or benefit to a publican whose business premises have been destroyed and his business discontinued.

Black L.J. has indicated the view I am inclined to take with regard to the provisions of section 2 of the 1942 Act. Sub-section (3) of that section and paragraph 4 of the Second Schedule contemplates a removal being authorised during the suspension of the licensing certificate. Section 2 (5) saves the avoidance of licences by reason of disqualification of premises: " (*a*) during the suspension of the licensing certificate; " or (*b*) where the destruction or damage occurred " before the passing of this Act, during any period " elapsing between the occurrence thereof and the " passing of this Act."

Inasmuch as a licensing certificate may be in suspense, as in the present case, for long after the licensing year in which a licence was current, these provisions appear to contemplate that the suspension of the licensing certificate preserves the licence to which it relates.

In paragraphs 1 and 2 of the Second Schedule to the Act a procedure is provided for the resumption of business in the licensed premises after they have been repaired. No new licencing certificate appears to be required, the court being only concerned as to the repair works having been executed in accordance with the approved plans. There is no suggestion in these provisions that a new excise licence is required, nor

is it clear to me what authority the appropriate official would have to issue such a licence on foot of the existing licensing certificate. That certificate relates to the licence originally granted on foot thereof—can a second licence for the same premises be granted under that certificate? It seems to me that here again the Legislature contemplates the continued existence of the original licence during the period, however long it may be, of the suspension of the licensing certificate.

Again, the continued existence of the licence appears to underlie the provisions of paragraphs 3 and 4 of the Second Schedule. It will be noted that the certificate is described as relating to the licence granted on foot thereof, thus in paragraph 3 there are the words "the "certificate . . . unless the licence to which it "relates . . ." and in paragraph 4 "where a removal "of a licence, in respect of which the licensing certi- "ficate is for the time being in suspense."

Paragraph 8 of the Second Schedule is interesting in this connection. It appears to be clear from its provisions that during the suspension of the licensing certificate it is not necessary to apply for the renewal of the licence, and again, as in section 2 (4), there are provisions as to a certificate for the transfer of the licence.

I am inclined to the view that a person whose licensing certificate is in suspense continues to be, during such suspension, a licensed person, and that as such he may apply for the removal of his licence under section 11 of the 1825 Act, his right to do so being preserved by section 2 (3) and paragraph 4 of the Second Schedule of the 1942 Act.

Appeal dismissed.

Solicitors for the appellant : *E. & L. Kennedy.*

Solicitors for the respondent : *Cunningham & Dickey.*

J. P.

REX v. MILLAR (1).

Criminal Law—Practice—Appeal against conviction—Matters to be considered by Court of Criminal Appeal—Criminal Appeal (Northern Ireland) Act, 1930 (20 & 21 *Geo.* 5, *c.* 45), *s.* 3.

On the hearing of an appeal against conviction on the ground that the jury's verdict was unreasonable and cannot be supported having regard to the evidence the Court of Criminal Appeal must consider the whole of the evidence. The fact that a portion of the evidence would by itself support a conviction does not prevent the court from interfering with the verdict.

Dictum of Pickford J. in *R. v. Hancox* (1913) 8 *Cr. App. R.* 193 explained.

In considering whether the jury's verdict can be supported the Court of Criminal Appeal is entitled to have regard to the fact that on a previous trial of the case the jury disagreed.

APPEAL against conviction and sentence.

The appellant was arraigned before Sheil J. at the Summer Assizes for the County of Down, 1950, for an indecent assault on a girl. The jury failed to agree and he was subsequently arraigned before Black L.J. at the following Winter Assizes. On this second trial the jury returned a verdict of guilty and the appellant was sentenced to eighteen months hard labour.

He appealed against conviction and sentence, the main ground of his appeal against conviction being that the verdict was unreasonable and could not be supported having regard to the evidence. He raised no objection to the evidence which had been admitted, nor to the judge's charge to the jury.

Jones K.C. and *Agnew K.C.* for the appellant.
McVeigh K.C. and *McCracken* for the Crown.

Cur. adv. vult.

PORTER L.J. [delivering the judgment of the court] :—

This is an appeal against conviction and sentence by George McBride Millar, a constable of the Royal Ulster

(1) In the Court of Criminal Appeal before Porter L.J. and Curran J.; Feb. 14, 15, 19, 1951.

Constabulary, who was found guilty at the last Winter Assizes held in Belfast of an indecent assault on Rachel Georgina Magee at Dromara on April 19, 1950, and was sentenced to eighteen calendar months with hard labour. Several grounds of appeal are set forth in the notice of appeal, but the main, and indeed the only ground relied upon by counsel for the appellant in this court was that the verdict was unreasonable and could not be supported having regard to the evidence. No complaint was made of any misdirection or non-direction of the jury ; no objection was raised to the admission or rejection of evidence, nor was it suggested that the case for the appellant was not presented fairly and fully to the jury by the learned trial judge. In these circumstances we were referred to *R. v. Hancox* (1), where Pickford J. delivering the judgment of the Court of Criminal Appeal is reported to have said that where there is no misdirection and there is evidence to support the conviction the Court of Criminal Appeal will not interfere with the verdict.

We do not think that this means that you are entitled to pick out and isolate a portion of the evidence which by itself would justify a conviction, and then say : "Here is evidence which supports a conviction and " the Court of Criminal Appeal cannot interfere ".

The true meaning is that where there is sufficient or satisfactory evidence to support a conviction, the Court of Criminal Appeal will not interfere—any other interpretation would render the words of section 3 (1) of the Criminal Appeal Act meaningless. Whether or not there has been a misdirection, the function of this court is to decide whether the verdict is unreasonable or cannot be supported having regard to the evidence—that is—to all the evidence.

[His Lordship then reviewed the evidence in detail. At the conclusion his Lordship adverted to the direct conflict of evidence between the two principal witnesses—the prisoner and the prosecutrix—and continued] :—

Mr. McVeigh for the Crown contended with great force that this was peculiarly a case for a jury ; that

(1) (1913) 8 Cr.App.R. 193, 197.

where there was such a conflict of evidence between the two principal witnesses it was for the jury who saw and heard the witnesses, and had the advantage of observing the manner in which they gave evidence and their demeanour in the witness box, to say who was telling the truth and that all questions of fact are for the jury and we would not be justified in quashing a conviction simply because the trial judge had expressed serious doubts about some parts of the evidence for the prosecution or even disagreed with the verdict.

It must, however, be observed that the trial judge had the same opportunity as the jury of seeing and hearing the witnesses and observing their demeanour and the manner in which they gave their evidence.

Although we would not be justified in quashing the conviction merely because there was a disagreement of the jury which tried the case at the County Down Assizes, yet this is a matter we are entitled to take into consideration : *R. v. Stephen Norton* (1).

We have been greatly assisted in our deliberations by the able and exhaustive arguments which have been addressed to us by counsel. It is a difficult case, but having given the matter long and careful consideration, we are clearly of opinion, on a review of all the facts and circumstances, that the appellant has succeeded in discharging the onus of satisfying us that the conviction is unreasonable and cannot be supported having regard to the evidence.

We therefore allow the appeal, quash the verdict and sentence and order the immediate release of the appellant.

Appeal allowed.

Solicitor for the appellant : *John P. McCann.*

Solicitor for the Crown : *The Crown Solicitor for the County of Down.*

J. P.

(1) (1910) 5 Cr.App.R. 65.

McDOWELL v. STRANNIX AND ANOTHER (1).

Practice—Medical examination of plaintiff in action for damages for personal injuries—Refusal of plaintiff to submit to examination except on terms—Stay of proceedings.

In an action for damages for personal injuries the plaintiff refused to submit to examination by the defendants' medical adviser except on terms that the medical adviser's evidence at the trial would be confined to the question of damages and that no evidence of any statement made by the plaintiff to him relating to the issue of liability would be given. The defendants refused to agree to these terms and moved to stay the proceedings until the plaintiff should submit to a medical examination without imposing any such terms.

Held, that since the proper function of a medical witness is to give expert evidence as to damages and not to give evidence as to liability the terms were reasonable and the motion must be refused.

MOTION to stay proceedings.

The plaintiff claimed damages for personal injuries which he alleged were caused by the negligence of the defendants in the driving of a motor car. The defendants' advisers requested the plaintiff to submit to a medical examination before the defence was filed. The plaintiff's advisers refused to allow such examination unless the defendants should agree that their medical adviser would not ask the plaintiff how the accident had occurred, and would not give evidence at the trial of any statements made by the plaintiff relating to that issue. These terms were rejected by the defendants, and a correspondence followed between the solicitors for the parties, in the course of which the plaintiff's solicitors modified their terms and were prepared to agree to a medical examination of the plaintiff provided that the defendants agreed that the evidence of the doctor would be confined to the question of damages and that no evidence would be given of any statement made by the plaintiff to the doctor relating to the issue of liability. The defendants' solicitors refused to accept these conditions, and moved to stay the proceedings until the plaintiff should submit to a medical examination without any such terms being imposed.

(1) In the King's Bench Division before Sheil J.; Feb. 16, 1951.

Brown for the defendants. The question of the doctor's evidence should be left to be dealt with by the trial judge, and the fact that in some cases there may be unfortunate consequences for the plaintiff does not constitute a ground for altering procedure of long standing. A medical witness is entitled to give evidence of any statements made to him by a party provided he acts bona fide. If he does not, there are sufficient remedies to provide for the mischief.

It is in the jurisdiction of the court to stay proceedings in a proper case: see Judicature (Ireland) Act, 1877, s. 27 (5) which provides that "nothing in "this Act contained shall disable [the Court] from "directing a stay of proceedings in any cause or "matter . . . if it shall think fit." I ask for an order staying this action until the plaintiff submits to be medically examined in the usual way, without conditions.

[Sheil J. Do you say that that will allow the doctor to enquire how the accident occurred?]

Yes, if it is relevant to the nature of the injuries.

[Sheil J. Is it not always relevant to that?]

My submission is that the doctor is entitled to make those enquiries, and if there be any unfairness the matter can be raised in court. In the last resort, if irreparable damage is done, a new trial may be ordered with costs against the defendant.

Nicholson K.C. and *McGrath* for the plaintiff. This matter does not arise out of an isolated occurrence. Medical advisers are taking advantage of their position to extract information which is being improperly used, that is to say on the issue of liability and not on the issue of damages. There is nothing objectionable in the terms now proposed unless the defendants are seeking to do the very thing of which we complain.

Unlike the procedure under the Workmen's Compensation Acts the Rules of the Supreme Court nowhere gives any right to one party to have a medical examination of the other party. The nearest analogy is O.50. r. 4., which relates to examination of property, and the authorities show that the court is scrupulous to prevent anything in the nature of "fishing" being

done under cover of that rule: see *Anon* (1) in which Archibald J. refused on that account to allow a defendant an examination of property until he should have filed his defence.

The jurisdiction of the court to stay proceedings is generally not exercised except where the whole action should be brought to an end, for example where it is an abuse of the process of the court. The notes on s. 27 (5) of the Judicature Act in Wylie, 2nd ed. p. 34, show that the only case in which an order to stay is made for the purpose of forcing the hand of a party is where the rules are being flouted, as for example where discovery is refused: *Willis v. Baddeley* (2).

[Sheil J. Is not a stay ordered on failure to give security for costs?]

Yes, but that is also a matter provided for by the Rules. In this case there is no question of any of the Rules being flouted, and therefore there is no jurisdiction to order a stay.

SHEIL J.: I do not accept the argument of Mr. Nicholson that the jurisdiction of this court to stay actions is confined within such narrow limits as he has suggested, but I can leave that point to be determined later if necessary and concern myself with the actual application made to-day.

In my opinion it is wrong in principle that a doctor should be entitled whether by examination, cross-examination or otherwise to elicit information as to how an accident happened, that is, as to a matter of liability, from a man who has been sent to him for medical examination as to his injuries, that is, as to a matter of damages, and that the information so obtained should be used in evidence against that man through the mouth of the surgeon to the tribunal of trial. A plaintiff—or it may now well be a defendant—might be an uneducated man unable to look after his own interests; he might be overawed or perhaps even confused by the surroundings of the surgery or even by the presence of the doctor himself.

I am told that the present practice is that a party's own doctor attends the medical examination by the

(1) 1876 W.N. 53. (2) [1892] 2 Q.B. 324.

opposite party's doctor and Mr. Brown has suggested that that is a safeguard against any unfair questions being asked. So far from that being so I am of opinion that in the case I have suggested the party's solicitor might properly think himself failing in his duty if he also did not attend, and, if the solicitor, why not counsel who will eventually have to conduct the case?

It may well be, as Mr. Brown has said, that for the purpose of a proper medical examination the doctor may have to ask questions as to how the accident happened. This is not the point. The point is as to the propriety of the doctor's giving evidence to contradict the party's version as to liability. On that I entertain no doubt whatever. In the case suggested by Mr. Brown I can see no objection to the doctor informing solicitor and counsel that the party said the accident occurred in such and such a way and that his injuries are not consistent with that story. That information could be used for purposes of cross-examination, that is, it could be suggested to the party that his injuries are inconsistent with his version of the accident if so they be.

The memorandum of December 6, 1950, sent by the plaintiff's solicitors is proper and reasonable in its terms.

It is as follows:—

"We agree that upon your client submitting "himself to be examined by our medical adviser, "the evidence of the latter will be confined at the "trial to the question of damages, and no evidence "of any statement made by the plaintiff to him "relating to the issue of liability will be given."

It is a valuable precedent protecting the interests of all, parties, doctors and legal advisers. In compliance with it the doctor remains what he should be—a professional witness.

The application will be refused with costs. I will, so far as I have jurisdiction, give a stay or enlarge the time for appealing to the last day of this term.

Motion dismissed.

Solicitors for the plaintiff: *D. O'Rourke & Son.*
Solicitors for the defendants: *C. & H. Jefferson.*

J. P.

CLELAND v. NEILL AND OTHERS (1).

Practice—Interrogatories—Libel—Malice—Matters within the knowledge of plaintiff.

In an action for libel the defendants pleaded that the words were published on a privileged occasion. The plaintiff in his reply alleged express malice, and then obtained leave to deliver and did deliver a number of interrogatories which the defendant objected to answer.

Held, (i) that it is no objection to an interrogatory that it seeks to establish that the defendant was actuated by express malice;

(ii) it is no objection to an interrogatory seeking information about what occurred at a meeting that the information sought is recorded in the minutes of that meeting;

(iii) it is no objection to an interrogatory delivered by a party that the matter is within the party's own knowledge if the answer may diminish the burden of proof on the party administering the interrogatories and save him the expense of proving a part of his case;

(iv) it is no objection to an interrogatory that it seeks to enquire whether the actual publisher of a libel had authority from the defendant to publish it.

MOTION to order the defendants to make further and better answers to interrogatories.

The plaintiff, a councillor of the Corporation of the City of Belfast and a member of the Belfast Corporation Unionist Party and East Belfast Unionist Association, brought an action for libel in respect of a letter written by James Alexander Mitchell, one of the defendants and honorary secretary of the Executive Committee of the Belfast Corporation Unionist Party, to Joseph McMurdock, the organising secretary of the East Belfast Unionist Association. The other defendants were members of the Executive Committee of the Belfast Corporation Unionist Party, and were present at the meeting of the party referred to in the letter the terms of which were as follows:—

"At a meeting held on Monday the 26th instant "the conduct of Alderman T. L. Cole and Councillor

(1) In the King's Bench Division before Sheil J.; Feb. 16, 23, 1951.

"A. Cleland at the meeting of the new housing "committee, where a chairman and deputy chairman "were elected, was reported and the meeting having "taken a serious view of said conduct unanimously "agreed that the party whip be withdrawn from the "two members in question. I am instructed to "notify you accordingly."

The plaintiff pleaded that by these words the defendants meant and were understood to mean that the plaintiff was a person unworthy and unfit to be a councillor of the City of Belfast and unworthy and unfit to be a member of either the Belfast Corporation Unionist Party or the East Belfast Unionist Association. The defendant Mitchell admitted, and the other defendants denied, the writing and publishing of the words complained of, and all of them denied that the words bore or were understood to bear any of the meanings set out in the innuendo, and they pleaded qualified privilege. By his reply the plaintiff pleaded that the words complained of were written and published with express malice. The plaintiff made application for leave to administer interrogatories, which application was granted. The defendants objected to the following interrogatories for the reasons indicated :—

(*a*) On the ground that they are irrelevant, unreasonable and oppressive ; that they do not relate to any matters in question at this stage of the action ; that they relate to matters which are within the knowledge of the plaintiff himself ; and that they consist of inquiries as to matters set out in, and which the proper and best evidence is, written documents, viz., the minutes of the General Purposes Committee of the Belfast Corporation which are not, nor is any copy thereof, in the possession or power of any of the defendants, and of the contents of which none of the defendants has any exact or definite recollection.

Interrogatories.

5. On the 23rd day of August, 1949, was there a motion before the General Purposes Committee of the Belfast Corporation concerning the conferring of the Freedom of the City of Belfast on Sir William Neill ?

6. If the answer to Q. 5 is, Yes, was the adjournment of the said motion proposed by Senator Cunningham ?

7. If the answer to Q. 5 is, Yes, was the adjournment seconded by Alderman T. L. Cole ?

8. Did the plaintiff speak upon the matter ?

9. If the answer to Q. 8 is, Yes, did he speak to the effect that Sir William Neill should not receive the Freedom of the City of Belfast at that time ?

10. Was the said motion of the 23rd day of August adjourned and if so for how long ?

11. On the 1st day of September, 1949, was there a motion before the Council of the Belfast Corporation concerning the conferring of the Freedom of the City of Belfast on Sir William Neill ?

12. If the answer to Q. 11 is, Yes, was the said adjournment proposed by Senator Cunningham ?

13. If the answer to Q. 11 is, Yes, was the said adjournment seconded by Alderman T. L. Cole ?

14. Did the plaintiff speak upon the matter ?

15. If the answer to Q. 14 is, Yes, did he speak to the effect that Sir William Neill should not receive the Freedom of the City of Belfast at that time ?

16. Was the said motion of the 1st day of September adjourned and if so for how long ?

(*b*) On the ground that they are oppressive and unreasonable ; that the plaintiff merely seeks thereby to ascertain the course which the defendants propose to adopt at the trial and the details of the evidence which they intend to adduce at the said trial ; that they are " fishing " and that they consist of an inquiry as to a question of law.

Interrogatories.

33. Did the defendants, Sir William Neill, etc., authorise the defendant Mitchell to send the letter dated the 28th day of September, complained of in this action to the Secretary of the East Belfast Unionist Association ?

34. If the answer to Q. 33 is, No, did any and if so which of the said defendants authorise the said James Alexander Mitchell to send the said letter to the said Secretary ?

Harrison K.C. and *Lowry* for the plaintiff. The right to interrogate is not limited to the issue and extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of facts directly in issue: *Marriott v. Chamberlain* (1); *Osram Lamp Works Ltd. v. Gabriel Lamp Co.* (2). It is not necessary that the answers should be conclusive on the question at issue. An interrogatory asking for the names of persons on whose information a defendant published a libel will in general be allowed unless it can be shown that the interrogatory is put from some ulterior motive and not bona fide for the purposes of the action: *White v. Credit Reform Association* (3), *Fitzgerald v. Watson* (4). In this case there is no search outside the ambit of the case to discover the names of persons defaming the plaintiff. It is indisputable that the defendant must answer to the best of his "knowledge, information and belief": *Douglas v. Morning Post Ltd.* (5). An answer that recollection is imperfect and that the facts are contained in documents is of no avail. A matter may be within the knowledge of the plaintiff but incapable of proof by him. A plaintiff has a right to get the defendants' version of what happened. One object of interrogatories is to enable a party to obtain admissions from the other party, and so to relieve himself from the necessity of adducing evidence: *Att.-Gen. v. Gaskill* (6); *Lyell v. Kennedy* (7). The defendant is entitled to be interrogated as to the alleged publication by him of the libel: *Tangyes v. Inman SS. Co.* (8).

Hanna K.C., *McVeigh K.C.* and *Moody* for the defendants. Interrogatories must not be administered merely as a manoeuvre. It is a principle that interrogatories will not be administered where the information could be obtained by particulars or by admissions. In the King's Bench Division interrogatories are not allowed as to the contents of written documents: *Fitzgibbon v.*

(1) (1886) 17 Q.B.D. 154.
(2) [1914] 2 Ch. 129.
(3) [1905] 1 K.B. 653.
(4) [1918] 2 I.R. 411.
(5) (1923) 39 T.L.R. 402.
(6) (1882) 20 Ch.D. 519, 528.
(7) (1883) 8 App.Cas. 217. 233.
(8) (1889) 88 L.T.Jo. 32.

Greer (1), *Dalrymple v. Leslie* (2). Interrogatories 8, 9, 14 and 15 are particularly objectionable ; their purpose is to ask the defendants what the plaintiff himself said. It does not follow that because the issue of malice is raised therefore all matters which might be the subject of cross-examination at the trial are properly the subject of interrogatories : *Caryll v. Daily Mail Publishing Co.* (3), *Elliott v. Garrett* (4). There are three main grounds for refusing to answer interrogatories : (i) that the questions are not relevant ; (ii) that the matters are within the power and knowledge of the party interrogating as well as of the opponent and can be proved by written documents ; and (iii) that the matters inquired into are not sufficiently material at that stage of the case. There is no precedent for the proposition that evidence which might be proof of malice not related to the alleged defamatory matter can be the subject of interrogatories. At best what the plaintiff is seeking is evidence that he had given cause why there should be malice. It is axiomatic that a matter of law cannot be the subject of interrogatories.

Cur. adv. vult.

SHEIL J. : The real contest has been with reference to Nos. 5 to 16, both inclusive, and Nos. 33 to 34, and the reasons for the objections to answer them are contained in the answers filed. Different considerations apply to each group.

In *Attorney-General v. Gaskill* (5), Sir George Jessel M.R., said that one of the great objects of interrogatories when properly administered is to save evidence, that is to diminish the burden of proof on the person so administering and to saving the expense of proving a part of the case, and in *Marriott v. Chamberlain* (6). Lord Esher said : " It does not, to my mind, signify, in " dealing with these questions, on whom it lies to prove " the facts with regard to which the interrogatory " is put ".

(1) (1875) I.R. 9 C.L. 294.
(2) (1881) 8 Q.B.D. 5.
(3) (1904) 90 L.T. 307.
(4) [1902] 1 K.B. 870.
(5) (1882) 20 Ch.D. 519, 528.
(6) (1886) 17 Q.B.D. 154, 163

I do not understand that those propositions are contested, but it is said that, for the reasons given, these particular interrogatories should not be answered.

It is important to consider the pleadings. In this libel action it is alleged that the plaintiff has been defamed by a letter written by the defendant Mitchell to the Organising Secretary of a body known as the East Belfast Unionist Association, of which the plaintiff was, and for all I know still is, a member, but of which it does not appear that any of the defendants was or is a member. It is admitted that the defendants are members of the Executive Committee of the Belfast Corporation Unionist Party and that the defendant Mitchell is the Honorary Secretary of the said Committee. The letter complained of purports to have been written on the instructions of the Party. Among other matters of defence there is a plea of qualified privilege, both for Mitchell, who admits the writing and publishing of the letter complained of, and by the other defendants who traverse that allegation.

If the plea of qualified privilege is made out the defendants are entitled to succeed unless the plaintiff can establish express malice, and that is realised by the plaintiff in his reply alleging express malice. Express malice, as distinct from implied malice, is a question of fact and must be proved as such. To that extent, therefore, the dicta cited are in point. Interrogatories 5—16 are designed to seek to establish malice in fact, the inference being (though I in no way decide whether that inference is or is not well founded) that prior to the incidents of the meeting of September 26, 1949, the plaintiff was in rebellion against, or at least hostile to, a motion to confer the freedom of the City of Belfast on the first-named defendant, and that something the plaintiff did or said at the meeting of September 26, 1949, was merely an excuse for sending the letter complained of, or that his conduct at that meeting was merely the culmination of a course of what I may call political heresy. In face of those possible inferences and, for aught I know, there may be others, can I conclude that the interrogatories now under consideration—excluding for the moment Nos.

8, 9, 14 and 15—are irrelevant or unreasonable, particularly having regard to the oft approved dictum of Lord Esher in *Marriott v. Chamberlain* (1) that "the "right to interrogate is not confined to the facts "directly in issue, but extends to any facts the exist- "ence or non-existence of which is relevant to the "existence or non-existence of the facts directly in "issue"? I am unable so to hold. They may indeed be oppressive—I suppose most interrogatories are—but that is not an answer.

Then it is said that the information sought can be obtained from the minutes of the Corporation's General Purposes Committee, which are written documents. I have not seen those minutes, and neither the originals nor any agreed copies have been exhibited, but I am quite unable to accept the suggestion that these interrogatories are as to the contents of any written documents. The plaintiff has not asked anything about these minutes; he has asked what in fact occurred at the meeting. That is what distinguishes this case from *Fitzgibbon v. Greer* (2), and *Dalrymple v. Leslie* (3), which were cases concerned with the contents of documents.

Nos. 8, 9, 14 and 15 gave me some concern. As I pointed out to Mr. Harrison the matters here raised were not only within the plaintiff's own knowledge, but must also in the circumstances be necessarily a matter of his proof. But on reflection I think those interrogatories should be answered. I do so for two reasons, first because they appear to be within the dictum of Jessel M.R., to which I have already referred and second because without them the remaining interrogatories—Nos. 5—16—might well be meaningless as showing no relevance to the matters in issue.

Nos. 33 and 34 remain. No one of the objections stated is well founded. It was strongly contended that they were an inquiry as to a question of law. Such a question might arise after these interrogatories had been answered—for instance scope of authority might become a material question—but until the question

(1) (1886) 17 Q.B.D. 154. 163.
(2) (1875) I.R. 9 C.L. 294.
(3) (1881) 8 Q.B.D. 5.

of fact has been answered with or without explanations, no question of law can arise. These two interrogatories are not directed generally to the general authority of the defendant Mitchell, or to the scope of his authority, but to the factual question of authority or no authority to write this particular letter.

Order accordingly.

Solicitors for the plaintiff: *N. & F. Tughan & Walmsley.*

Solicitors for the defendants: *Peden & Reid.*

S. M. M.

SMITH v. LYNN (1).

Vendor and purchaser—Misrepresentation—Specific performance.

A statement of mere opinion by one party to a contract which is relied on by the other party and which induces the contract does not in general give any title to relief unless fraud be established. But where the facts are within the peculiar knowledge of the party expressing the opinion such opinion may impliedly state that he has positive knowledge justifying the opinion.

An advertisement of a house to be sold by auction described the property as being "in excellent structural and decorative repair, "and ready for immediate owner occupation." The defendant read this advertisement and bought the house at the auction. The defendant subsequently discovered that the woodwork was infested with woodworm to such an extent that the judge found as a fact that the house was not "in excellent structural repair" and was not "ready for immediate owner occupation."

Held, that as the plaintiff and the defendant had equal opportunities of inspecting the house and as neither had discovered the presence of the woodworm the statements in the advertisement amounted to mere expressions of opinion, and accordingly the plaintiff was entitled to a decree of specific performance.

ACTION tried by Curran J.

In March, 1949, a Mr. Steele advertised for sale by auction a leasehold dwelling house. The advertisement which was drafted by the auctioneers after an inspection described the property as follows:—"The "property is brick-built, pebble dashed, and slated "and of sound construction. It is in excellent "structural and decorative repair, and ready for "immediate owner occupation." Both the plaintiff and the defendant saw this advertisement. The plaintiff instructed a representative to inspect the property and subsequently to attend the auction on her behalf. The defendant inspected the property and attended the auction in person. At the auction on March 11, 1949, the property was sold to the plaintiff as highest bidder.

On April 26, 1949, the plaintiff decided to resell the property and the same auctioneers were employed.

(1) In the Chancery Division before Curran J.; Oct. 24, 25, 26; Dec. 11, 1950.

The auctioneers without making any further inspection issued an advertisement which was in all material respects the same as that issued on the occasion of the previous sale. The defendant saw this second advertisement, and being curious that the property should be sold again in such a short time he enquired of the auctioneers the reason and was told that plaintiff's maidservant was unwilling to move to the house and the plaintiff was unwilling to go without her. The defendant without further inspection attended the auction on May 13, 1949, and purchased the property for £3,000. Later the same day the defendant went over the house and noticed for the first time that there was woodworm in the hall panelling and in the stairs. The defendant thereupon refused to complete the purchase.

The plaintiff brought this action claiming specific performance of the contract to purchase. The defendant in his defence alleged fraudulent misrepresentation, innocent misrepresentation and breach of warranty, and counterclaimed for rescission of the contract and, in the alternative, damages.

The judge found that the infestation of woodworm was such that at all material times the house was not in excellent structural repair and was not ready for immediate owner occupation. He also found that the plaintiff had not either personally or through her agents any knowledge of the infestation at the time of the sale to the defendant.

Harrison K.C. and *Reid* for the plaintiff.
McVeigh K.C. and *Fox* for the defendant.

Cur. adv. vult.

CURRAN J. [having stated the facts and his findings thereon continued]:

On behalf of the plaintiff Mr. Harrison contends that the statements in the advertisement—"excellent "structural repair" and "ready for immediate owner "occupation" are not statements of fact but merely expressions of opinion, and that, accordingly, neither of them constitutes a representation of fact upon

which either proceedings for rescission or damages or a defence to a claim for specific performance can be founded. For the defendant Mr. McVeigh contends that the statements in question constitute statements of fact, and, alternatively, that, if they are expressions of opinion, they are to be treated as statements of fact if the person expressing the opinion had no material upon which to base such opinion ; or, in other words, that an expression of opinion is a representation of a fact, namely, that the person expressing the opinion is aware of facts justifying such opinion. Mr. Harrison counters this by contending that where the parties have equal knowledge of the condition of the property in question no such representation of fact is inherent in an expression of opinion by the person affirming the contract.

The principles underlying the foregoing contentions and what are the relevant inquiries in a case such as the present are discussed in the judgment of the Privy Council in the case of *Bisset v. Wilkinson* (1). The headnote is as follows :—

"A representation of fact may be inherent in a "statement of opinion ; in any case the existence of "the opinion in the person expressing it is a question "of fact. When it is sought to rescind a contract on "the ground of the falseness of a statement of "opinion by which it was induced, it must be "inquired what was the meaning of the statement "made, and whether it was true. Relevant to "those inquiries are, the material facts of the "transaction, the knowledge of the parties, the "words used, and the actual condition of the "subject-matter.

"In an action by a vendor of land in New Zealand "to recover under the contract, the purchaser "claimed to rescind the contract on the ground of the "falseness of a statement as to the carrying capacity "of the land for sheep :—

"*Held*, on the evidence, applying the above "considerations, that the statement was merely of "an opinion which the vendor honestly held, and "accordingly that the defence failed."

(1) [1927] A.C. 177.

In giving the opinion Lord Merivale says (1) :—

" In an action for rescission, as in an action for " specific performance of an executory contract, " when misrepresentation is the alleged ground of " relief of the party who repudiates the contract, it " is, of course, essential to ascertain whether that " which is relied upon is a representation of a specific " fact, or a statement of opinion, since an erroneous " opinion stated by the party affirming the contract, " though it may have been relied upon and have " induced the contract on the part of the party who " seeks rescission, gives no title to relief unless fraud " is established. The application of this rule, how- " ever, is not always easy, as is illustrated in a good " many reported cases, as well as in this. A repre- " sentation of fact may be inherent in a statement " of opinion and, at any rate, the existence of the " opinion in the person stating it is a question of " fact. In *Karberg's Case* (2) Lindley L.J., in course " of testing a representation which might have been, " as it was said to be by interested parties, one of " opinion or belief, used this inquiry : ' Was the " ' statement of expectation a statement of things " ' not really expected ? ' The Court of Appeal " applied this test and rescinded the contract which " was in question. In *Smith v. Land and House* " *Property Corporation* (3) there came in question a " vendor's description of the tenant of the property " sold as ' a most desirable tenant '—a statement of " his opinion, as was argued on his behalf in an " action to enforce the contract of sale. This " description was held by the Court of Appeal to be " a misrepresentation of fact, which, without proof " of fraud, disentitled the vendor to specific per- " formance of the contract of purchase. ' It is often " ' fallaciously assumed,' said Bowen L.J., ' that " ' a statement of opinion cannot involve the " ' statement of fact. In a case where the facts " ' are equally well known to both parties, what one " ' of them says to the other is frequently nothing

(1) Ibid 181.
(2) [1892] 3 Ch. 1, 11.
(3) (1884) 28 Ch.D. 7, 15.

" ' but an expression of opinion. The statement of
" ' such opinion is in a sense a statement of fact,
" ' about the condition of the man's own mind, but
" ' only of an irrelevant fact, for it is of no conse-
" ' quence what the opinion is. But if the facts are
" ' not equally well known to both sides, then a
" ' statement of opinion by one who knows the facts
" ' best involves very often a statement of a material
" ' fact, for he impliedly states that he knows facts
" ' which justify his opinion.' The kind of dis-
" tinction which is in question is illustrated again
" in a well known case of *Smith v. Chadwick* (1).
" There the words under consideration involved the
" inquiry in relation to the sale of an industrial
" concern whether a statement of ' the present value
" ' of the turnover or output ' was of necessity a
" statement of fact that the produce of the works
" was of the amount mentioned, or might be and
" was a statement that the productive power of the
" works was estimated at so much. The words were
" held to be capable of the second of these meanings.
" The decisive inquiries came to be : what meaning
" was actually conveyed to the party complaining ;
" was he deceived, and, as the action was based on a
" charge of fraud, was the statement in question
" made fraudulently ?

" In the present case, as in those cited, the material
" facts of the transaction, the knowledge of the
" parties respectively, and their relative positions,
" the words of representation used, and the actual
" condition of the subject-matter spoken of, are
" relevant to the two inquiries necessary to be
" made : What was the meaning of the representa-
" tion ? Was it true ? "

After dealing with some of the facts Lord Merivale says (2) :—

" As was said by Sim J. : ' In ordinary circum-
" ' stances, any statement made by an owner who
" ' has been occupying his own farm as to its
" ' carrying capacity would be regarded as a

(1) (1884) 9 App.Cas. 187 ; (1882) 20 Ch.D. 27.
(2) [1927] A.C. 177, 183.

" ' statement of fact. . . . This, however, is not
" ' such a case. The defendants knew all about
" ' Hogan's block and knew also what sheep the
" ' farm was carrying when they inspected it.
" ' In these circumstances . . . the defendants
" ' were not justified in regarding anything said
" ' by the plaintiff as to the carrying capacity as
" ' being anything more than an expression of his
" ' opinion on the subject.' In this view of the
" matter their Lordships concur.

" Whether the appellant honestly and in fact
" held the opinion which he stated remained to
" be considered. This involved examination of
" the history and condition of the property. If a
" reasonable man with the appellant's knowledge
" could not have come to the conclusion he stated,
" the description of that conclusion as an opinion
" would not necessarily protect him against
" rescission for misrepresentation."

I now proceed to consider the application of the foregoing principles to the present case.

The advertisement contains statements which are undoubtedly statements of fact, such as " the property " is brick built, pebble dashed and slated." No question of standard or degree enters into these statements. When the advertisement goes on, however, to state that the property is " in excellent structural " and decorative repair and ready for immediate " owner occupation " one is faced with the question : " What standard has the person making those state- " ments applied ? " What A would regard as an " excellent " state of repair B might regard as only " moderate " ; A might regard the premises as ready for immediate owner occupation ; B might have more extravagant or artistic tastes and disagree. It is my view that the statements referred to are expressions of opinion, and that the opinions expressed are erroneous. Was the position of the parties such that, nevertheless, those expressions of opinion constituted statements of fact ? Both parties (the plaintiff through Mr. Kirkpatrick) inspected the premises prior to the auction on March 11, 1949, when the plaintiff pur-

chased the property. It is clear that neither of them had discovered the woodworm infestation before that date. Mr. Morgan, who drafted the first advertisement for Mr. Steele, had also inspected the premises in a cursory manner before the first sale without discovering the woodworm infestation.

It is suggested, however, that the plaintiff either personally or by her agents had discovered the woodworm infestation after the first and before the second sale.

[His Lordship then considered the evidence relating to the circumstances in which the plaintiff decided to sell the property and found that neither she nor her agents had discovered the existence of the woodworm. His Lordship then continued:—

If I am right in this view it follows that the plaintiff and the defendant were at the time of the second auction in the same position so far as knowledge of the condition of the premises was concerned. Accordingly, I hold that the expressions of opinion in the advertisement as to the condition of the premises do not, in the circumstances of this case, constitute representations of fact. I must further consider, however, whether a reasonable person with plaintiff's knowledge could have come to the conclusions stated in those expressions of opinion. If not the description of those conclusions as opinions would not necessarily protect the plaintiff against rescission of the contract for misrepresentation. It appears to be clear from the case made by the defendant and from the evidence before me that were it not for the woodworm infestation, and to a minor degree the dryrot and floor sinkage in the morning room, it would be reasonable to describe the property as being of sound construction and in excellent structural and decorative repair and ready for immediate owner occupation. It follows that a person who had no knowledge of the woodworm infestation would not be acting unreasonably in so describing the property. I find, accordingly, that the conclusions stated in the advertisement could have been arrived at by a reasonable person with the knowledge the plaintiff had at that time. It is contended, however, that having

regard to the cursory inspection made by Mr. Morgan before drafting the first advertisement, and the plaintiff's failure to cause a further inspection to be made before publishing the second advertisement, there was an element of negligence and even of recklessness in the conduct of the plaintiff which constitutes legal fraud or at least disentitles the plaintiff to enforce specific performance of the contract. In my opinion the evidence does not warrant such a finding. In my view the plaintiff's state of mind as to the condition of the premises at the time of the second sale was the same as her state of mind at the time of the first sale when she willingly paid £3,600 for the property. She was satisfied as to the condition of the premises by reason of the fact that she had engaged Mr. Kirkpatrick to inspect them before she purchased. I must finally consider whether, having regard to the findings I have made, I should, nevertheless, in the exercise of a judicial discretion, refuse to grant specific performance of the contract. The auctioneer who drafted the advertisement states in evidence that even now, when he has full knowledge of the woodworm infestation, he would describe the premises as being in excellent structural repair and ready for immediate owner occupation. It may be that it would be normal practice for any auctioneer to describe the premises in those words in an advertisement for sale.

As I have already indicated, however, it is not my view that the words used in the advertisement were apt to describe the actual condition of the premises. The law gives no special sanctity to statements contained in an advertisement for the sale of property. They may, for example, be made the subject of proceedings based upon misrepresentation or may be relied upon as grounds for rescission of a contract or in answer to a claim for specific performance—provided the necessary elements are present. Such advertisements, however, must be looked at in their true perspective. They do not purport to be detailed reports by experts as to the condition of the property to be sold. It is common knowledge that the purpose of such advertisements is to draw attention to the

good points of the property, and that one usually finds in such advertisements rather flourishing statements.

Having seen and heard the defendant in the witness box I am of opinion that he is a man of considerable intelligence. He made an excellent witness and impressed me as a keen and forthright man of business. As one would expect he was not content merely to read the first advertisement and then proceed to bid at the auction. He personally inspected the premises. That is, of course, the common practice, and the advertisement contained the usual notice setting out the hours during which the premises would be open for inspection. In my opinion the defendant is not the type of person to rely, any more than Mr. Brown said he himself would rely, on what he described as "auctioneers' encomiums." There is something to be said for the contention that defendant placed more reliance upon the description of the property in the second advertisement by reason of the fact that the plaintiff was reselling the property so soon after she had purchased it. According to defendant's evidence his object in scrutinising the second advertisement was to ascertain whether there was any change from the first advertisement that would give a clue as to why the property was being resold. He found no such change. In this negative sense I think the statements in the second advertisement were at that time present to defendant's mind. In my view, however, what the defendant was thinking of was the possibility that plaintiff might have discovered something about the premises that he himself had not discovered on his inspection prior to the first sale. I am inclined to the view that the statement in the advertisement assumed a more positive importance in defendant's mind after his discovery of the woodworm and when he came to consider with his advisers what grounds he had for getting out of his contract. When defendant consulted his solicitor and then rang the plaintiff's solicitor on the telephone on the morning of May 14, 1949, he made no reference to the advertisement nor to misrepresentation, what he complained of was a hidden defect. In his later telephone conversa-

tion with the plaintiff's solicitor on May 17 defendant for the first time mentioned misrepresentation but did not even then refer to the advertisement. His solicitor wrote on May 25, 1949, and referred to serious misrepresentation—again without mentioning the advertisement. The advertisement was first mentioned in the defence and counterclaim which was delivered on November 9, 1949. Even then the only statements relied upon were that the property was of sound construction and in excellent structural and decorative repair. The further statement that the property was ready for immediate owner occupation was not added until I gave liberty to amend during the hearing.

On the evidence I am satisfied that the statements complained of did not in any positive sense induce the defendant to purchase or contribute to the inducement of the defendant. If I were satisfied that defendant was so induced or if I had a reasonable doubt as to whether he was so induced or not I would find it necessary to give further consideration to the question as to whether specific performance of the contract should be granted.

In my view plaintiff and defendant must both be treated as innocent parties in the transaction and in all the circumstances of the case plaintiff is entitled to specific performance of the contract. This may be a hardship to the defendant, but that, by itself, is not a ground for refusing to enforce the contract.

Judgment for plaintiff on claim and counterclaim.

Solicitors for the plaintiff: *Johns, Elliott, Wallace & Co.*

Solicitor for the defendant: *L. I. G. Fox.*

S. M. M.

PETTY v. LAVELLE (1).

Customs—Notice of seizure—Notice to be given by letter—Meaning of "letter"—Requirement of notice mandatory—Notice not a condition precedent to jurisdiction of court to condemn—Customs Consolidation Act, 1876 (39 & 40 *Vict.*, *c.* 36), *s.* 207.

The Customs Consolidation Act, 1876, s. 207, provides that a customs officer seizing goods shall give notice in writing of such seizure to the owner or master either by delivering the same to him personally or by letter addressed to him and transmitted by post or delivered at his last known place of abode or business, if known.

Held, (i) that the handing of the seizure notice to the owner's wife was not a delivery by letter within the meaning of the section: a "letter" for this purpose is a written or printed communication to which something has to be done before its message is revealed, as by removing a covering, unfolding, untying or breaking a seal;

(ii) that the provisions of the section relating to the giving of notice are mandatory and not merely directory, and that accordingly the service in this case was bad.

Held further, however, that the jurisdiction of the court to condemn seized goods does not depend on the observance of the requirements of s. 207 with regard to the service of a seizure notice. The giving of the notice is a condition precedent to automatic condemnation without adjudication under the terms of the section, but where the owner of the goods makes a claim the court has power to entertain proceedings for condemnation even though there has been no proper notice of seizure given.

Quaere whether the court can entertain proceedings for condemnation where there has been no proper notice given and the owner of the goods has not made a claim.

CASE STATED by the resident magistrate sitting at Crossmaglen Petty Sessions on the construction of s. 207 of the Customs Consolidation Act, 1876 (2).

(1) In the King's Bench Division before Lord MacDermott C.J. and Curran J.; April 18, 19, 26, 1951.

(2) By the Customs Consolidation Act, 1876, s. 207:

"Whenever any seizure shall "be made, unless in the possession or in the presence of the "offender, master, or owner as "forfeited under the Customs "Acts or under any Act by "which Customs officers are empowered to make seizures, the "seizing officer shall give notice "in writing of such seizures and "of the grounds thereof to the "master or owner of the things "seized, if known, either by "delivering the same to him "personally or by letter addressed to him and transmitted "by post to or delivered at his "last known place of abode or

At Crossmaglen Petty Sessions held on October 20, 1950, the appellant, an Officer of Customs and Excise, brought proceedings by way of summons against the respondent for the forfeiture and condemnation of a motor lorry which, as alleged in the summons and the preceding information, had been seized at Mounthill, Crossmaglen in the County of Armagh on May 2, 1950, on the ground that it had then been made use of in the conveyance of merchandise, viz. twelve pigs, into Northern Ireland outside the prescribed hours and by a non-approved route contrary to the regulations made under section 4 of the Irish Free State (Consequential Provisions) Act, 1922, and had thereby become liable to forfeiture under section 4 (2) of that Act.

Those proceedings had been directed by the Commissioners of Customs and Excise following a claim made in respect of the lorry by the respondent as owner thereof through his solicitor. At the hearing at petty sessions the appellant adduced proof of the seizure and of the grounds of forfeiture alleged in the summons. It was also proved that the respondent had not been present at the time of the seizure and

"business, if known; and all "seizures made under the "Customs Acts or under any "Act by which Customs officers "are empowered to make "seizures shall be deemed and "taken to be condemned, and "may be sold or otherwise dis- "posed of in such manner as the "Commissioners of Customs may "direct, unless the person from "whom such seizure shall have "been made or the master or "owner thereof, or some person "authorised by him, shall, within "one calendar month from the "day of seizure, give notice in "writing, if in London, to the "person seizing the same, or to "the secretary or solicitor for the "Customs, and if elsewhere, to "the person seizing the same, or "to the collector or other chief "officer of the Customs at the "nearest port, that he claims the "things so seized or intends to "claim them, whereupon pro- "ceedings shall be taken for the "forfeiture and condemnation "thereof either by information "filed in the High Court of Justice "in England on the revenue side, "or exhibited before any justice "of the peace; but if any things "so seized shall be of a perishable "nature, or consist of horses or "other animals, the same may by "direction of the Commissioners "of Customs be sold, and the "proceeds thereof retained to "abide the result of any claim "that may legally be made in "respect thereof."

that a notice in writing of such seizure and of the grounds therefor had been delivered to the respondent's wife on May 13, 1950, at the respondent's residence. This notice was signed by the officer who made the seizure and, at the foot thereof, was addressed to the respondent in the following manner: - "To Patrick "Lavelle, Lurgancullenboy, Silverbridge P.O., Newry, "Co. Down." The notice was not contained, at the time of service, in any envelope or other covering. It was handed to the respondent's wife as an open message, capable of being read in the state it was in when delivered.

At the conclusion of the appellant's case the respondent's solicitor contended that the notice of seizure had not been given as required by s. 207 of the Customs Consolidation Act, 1876, in that, the respondent not having been served personally, the notice should have been given "by letter addressed "to him." Delivery of the bare notice was not, it was contended, delivery of the notice by letter. After hearing argument the learned resident magistrate acceded to this submission. His decision is set out in the case stated as follows:—

"I held that section 207 required that where "service was by delivery at the Defendant's resid- "ence the notice must be by letter; that in this "case the notice as proved on behalf of the Com- "plainant had not been given by letter, and that, "therefore, the provisions of the Statute had not "been observed, and that, this being a matter of "forfeiture, strict observance was essential in the "proceedings. Accordingly, without calling on the "Defendant to tender evidence, I refused the "application and dismissed the Summons on the "merits."

The question of law is thus stated in the last paragraph of the case:—

"And the Opinion of the Court is sought as to "whether I was right in law in refusing the application "and dismissing the Summons for the reason stated."

Harrison K.C. and *Boaman* for the appellant.

O'Donnell for the respondent.

Cur. adv. vult.

LORD MACDERMOTT C. J. [stated the facts and continued] :

As is not unusual in appeals of this nature the submissions advanced in this court ranged more widely than in the court below. The first point made on behalf of the appellant was entirely new. Section 207 does not require notice of seizure to be given where the seizure has been made " in the presence of the offender ". . . or owner." The " offender " in the present instance was, it was said, the driver of the lorry and as he, the argument proceeded, was present at the time of seizure there was no need to give any notice of seizure and the manner in which it was given was therefore immaterial and could not affect the validity of the subsequent proceedings. In my opinion this point is not now open to the appellant. There is nothing to show that the driver was charged with or convicted of any offence and the facts found are, to my mind, quite insufficient to justify this court in expressing any view on this particular matter. The case was obviously never directed to it and it lies outside the ambit of the question of law submitted for determination.

I come, then, to the requirements of section 207 as to the giving of notice of seizure. If, as here, the owner is known the notice can be given in three ways : (*a*) by delivering the notice to him personally, (*b*) by letter addressed to him and transmitted by post to his last known place of abode and (*c*) by letter addressed to him and delivered at his last known place of abode. The last of these methods was that attempted in the present case and the immediate question is whether what was delivered to the respondent's wife, at what admittedly was his last known place of abode, was a " letter " within the meaning of the section.

The word " letter " is commonly used in a number of different senses, but of these only two fall to be considered in this context and a choice must now be made between them. In the first the word signifies a written or printed message and little if anything more. Thus one speaks of a letter to the press, a well phrased letter, a begging letter etc. It is in this sense, to give

a statutory instance, that the word appears to be used in section 262 of the Act of 1876 in the expression "the order, or any letter . . . referring thereto . . .". In the second sense the word is used to connote a written or printed message prepared for transmission in a form designed to afford it some degree of protection, the most usual reason for this, perhaps, being to keep the message from the eyes of those to whom it is not addressed. The ordinary, though not the only method of protection, is by enclosing the message in an envelope addressed to the person to whom it is directed. Thus one talks of letters that are ready for the post or wonders what a particular letter may contain. The statute book also knows this use of the word, as witness section 26 of the Interpretation Act, 1889, which speaks of "a letter containing the document." It is difficult to state this second meaning with precision but there can, I think, be no doubt that it has long been a common use of the word and that the general idea thereby conveyed is of a written or printed communication to which something has to be done before its message is revealed, as by removing a covering, unfolding, untying or breaking a seal.

After a close study of section 207 I have come to the conclusion that the word "letter" is employed therein in this second sense and that the learned resident magistrate was right in holding that the notice of seizure delivered in this case was not delivered "by letter" as the section requires. I cannot but think that, had the intention been to refer throughout to the written notice of seizure and to it alone, the word "letter" would have been avoided, for in that case its use would add nothing and could only make for confusion. The natural way of implementing such an intention would, I think, have been to say "either by delivering the same to him personally or by addressing the same to him and transmitting it by post to, or delivering it at, his last known place of abode . . .". Why exactly the word "letter" was introduced in section 207 must remain a matter of speculation. It may have been because service by post was also in contemplation and the propriety of sending an open seizure notice by

post was in question; it may have been merely for reasons of privacy; or it may have been thought that in cases where personal service was not effected the notice was more likely to reach the addressee if its contents were not revealed to all and sundry on the way. But, whatever the reason, it cannot be said that the use of the word "letter" in the second sense to which I have referred would have been purposeless. I think its insertion indicates that something more than a reference to the written notice was intended, and if that be so I do not think it possible to stop short of the second meaning. I would therefore hold that the notice of seizure in this case was not served in accordance with the requirements of the statute.

The next question is whether the provisions of section 207 are, in this respect, mandatory. For the appellant it was contended before us that, even if the learned Resident Magistrate were right in his view of the meaning of "letter", the requirements of the section were directory and not mandatory. I am unable to accept this contention. The language of the section is mandatory, the possible methods of service are described with particularity, and the consequences of service may be so drastic and damaging for the person served that strict compliance with the statutory requirements must be taken as intended. Further, if it is right to say that the word "letter" is used in the section because it signifies something more than the mere notice of seizure, a construction which, in its practical effect, would ignore the distinction ought not to prevail.

So far there is no ground for disagreement with the conclusions of the learned resident magistrate. But the question then arises whether, having held as he did regarding service, he was right in dismissing the summons. This does not appear to have been the subject of argument before him; it is, however, a matter of law going to jurisdiction and must be determined if the question submitted is to be answered.

For the appellant it was contended that the jurisdiction at petty sessions was unaffected by failure to comply with the requirements as to service of the

notice of seizure, and that once the Commissioners had received the respondent's notice of claim they had not only a right but, by virtue of the provisions of section 207, a duty to bring the present proceedings. This submission would be difficult to sustain if the proceedings initiated by the appellant depended, according to the sound construction of that section, upon the due observance of its provisions as to service of the seizure notice, mandatory as I would hold those provisions to be. But, despite the somewhat involved structure of section 207, I think it is reasonably clear that there is no such dependence. That is not to say that the provisions as to service of the seizure notice beat the air and are devoid of consequence. On the contrary, the part of the section which provides for what I may call the automatic condemnation of what has been seized seems necessarily to turn on compliance with the directions as to service. The object of giving due notice of the seizure must be to afford the person served an opportunity of claiming the seized goods, and if a claim is made in the specified manner and within the specified period there can be no condemnation without an adjudication. If, then, the directions as to service are not obeyed I think it must follow that what is seized remains uncondemned unless and until it is condemned by a competent court. Yet, if the contention of the respondent in support of the dismissal is right, the effect of such disobedience goes far beyond this; there is not only no automatic condemnation, but no jurisdiction to condemn, and the title to what has been seized must remain undecided, at least so far as the Act of 1876 is concerned. I do not think this anomalous result can be accepted as the intention of the Legislature unless the terms of section 207 clearly demand it. I do not think they do. I do not think their purpose was to confer any new jurisdiction upon the court. What the section says is that if a notice of claim is duly given "proceedings shall be "taken for the forfeiture and condemnation" of what has been seized either in the High Court or before a justice of the peace. That, in my opinion, is a direction to invoke, not a special jurisdiction con-

ferred by the section, but the general jurisdiction conferred by section 218 of the Act of 1876 as now amended. In the case of forfeiture proceedings at petty sessions in respect of goods that have been seized, the court must also regard section 226. But the function and duty of the court under these sections do not, so far as I can discern, rest in any way upon the service of a notice of seizure. There is no express provision to that effect and I see no reason why any should be implied. What, then, are the Commissioners to do if, having received a claim to seized goods from the owner thereof, they find that he has not been served with the notice of seizure or that the service has been irregular ? The sensible course would be to initiate condemnation proceedings and that, in my opinion, is what section 207 tells them to do. I think that is the natural meaning of the words used. The " whereupon " which commences the part of the section dealing with the taking of proceedings seems to me to refer only to the giving, in accordance with the preceding provisions, of a notice of claim. This view, it may be added, also gains support from the fact that under the section a notice of claim may be given by the person from whom the goods have been seized though notice of seizure does not require to be given to such a person. In a case where there has been a seizure but neither service of a notice of seizure nor of a notice of claim, it would seem that section 207 does not impose a duty on the Commissioners to take proceedings. As at present advised I incline to the view that in such a case there is nothing in the section to prevent the institution of proceedings for condemnation or to oust the jurisdiction to hear and determine such proceedings. That, however, is not this case and I need not decide it. Here the respondent, as owner, has claimed the lorry and the proceedings which followed were, in my opinion, regularly brought and within the competence of the court to determine.

To avoid misunderstanding I should perhaps add that in reaching this conclusion I have not taken into consideration a further submission on behalf of the appellant to the effect that the claim made by the

respondent operated as a waiver of the error in service. Waiver is a matter of intention and I doubt if this point is open to the appellant on the case as stated. However that may be, I am content to rest this judgment on the broader ground that due service of the notice of seizure was not a condition precedent to the jurisdiction of the court.

For these reasons I am of opinion that the question submitted by the learned resident magistrate should be answered in the negative, and that the case should go back for hearing and determination in accordance with law.

CURRAN J.: I have arrived at the same conclusions and for the same reasons.

Appeal allowed.
Case remitted.

Solicitor for the appellant: *Chief Crown Solicitor.*
Solicitor for the respondent: *P. Gerard Curran.*

S. M. M.

COMMISSIONERS OF INLAND REVENUE v. WALSH AND ANOTHER (1).

Revenue—Excess profits tax—Executors carrying on testator's trade of publican—Whether stock-in-bond still trading stock in hands of executors—Finance Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 46), *s.* 26.

A publican devised and bequeathed his licensed premises and fixtures on trust for sale in favour of his two sons. He further devised and bequeathed the residue of his estate on trust for sale in favour of the same two sons. Included in the residue of the estate was a stock of wines and spirits held in bond. The executors carried on the business for six months for the purpose of winding up. The stock-in-bond was not sold until eighteen months later.

Held, that the stock-in-bond was trading stock in the hands of the executors and that the proceeds of the sale thereof were liable to assessment for excess profits tax.

CASE STATED by the County Court Judge of the County of Down under the provisions of the Finance (No. 2) Act, 1939, s. 21 (2), the Finance Act, 1937, Schedule V, Pt. II, para. 4, and the Income Tax Act, 1918, s. 149.

John Smith for some years before his death carried on trade as a publican in Bangor on licensed premises which he owned. During his lifetime he purchased a quantity of wines and spirits in bond, some in Northern Ireland and the remainder in Eire. This stock-in-bond was included at its cost price of £805 3*s.* 11*d.* in the John Smith's Trading and Profit and Loss Accounts and Balance Sheets for the year ended November, 5, 1942, and for the period November 5, 1942, to November 24, 1942, (the date of his death).

John Smith died on November 24, 1942, having by his will dated November 23, 1942, appointed the respondents to be his executors and trustees thereof. This will was duly proved by the respondents in the Principal Probate Registry of the High Court of Justice in Northern Ireland on March 30, 1943.

(1) In the King's Bench Division (Revenue) before Curran J.; Feb. 5, 22, 23; March 8, 1951.

By his will John Smith (inter alia) gave devised and bequeathed his licensed premises with the licences and fixtures and fittings attached thereto unto his trustees upon trust to sell the same as therein mentioned and to hold the proceeds of such sale for his sons John Smith and Edward Smith in equal shares as tenants in common.

As to the rest residue and remainder of his estate, John Smith left, devised and bequeathed the same to his trustees upon trust to sell the same and, after paying thereout certain expenses and pecuniary legacies, to pay the balance of such proceeds of sale to his said two sons John Smith and Edward Smith in equal shares as tenants in common.

The stock-in-bond was valued on the death of the said John Smith for the purposes of Estate Duty as follows :—

Stock in Eire	£3,663
,, ,, Northern Ireland	£2,363
	£6,026

From the date of the death of John Smith on November 24, 1942, until May 30, 1943, the respondents ran the licensed premises, employing a barman, though they only had a protection order and had not obtained a transfer of the licence. It was admitted that during this period the respondents were carrying on a trade in respect of the said licensed premises the profits of which were assessable to income tax and excess profits tax.

During this period, namely from November 24, 1942, to May 30, 1943, the respondents had no dealings with the stock-in-bond except that on January 8, 1943, a quarter cask of Comber whiskey was taken from the stock-in-bond into stock in the licensed premises. The reason for this was that the public house had run out of ordinary un-named whiskey and the barman had asked for some to keep the business going. It was not possible at the time to obtain any otherwise than from the bonded stock.

The stock-in-bond appeared in the Trading and Profit and Loss Accounts and Balance Sheet of the

executors at the original figure of £805 3*s*. 11*d*. These accounts also showed that during the period of their trading the executors spent £1,340 8*s*. 11*d*. on the purchase of liquor such as beer and stout for sale on the licensed premises.

On April 30, 1943, the respondents contracted to sell the licensed premises to a Mr. Bracewell for £6,300 and the sale was completed on May 30, 1943.

This sale of the licensed premises on May 30, 1943, did not include the stock-in-bond. Such stock-in-bond was not sold until eighteen months later when the whole of such stock was sold by public auction in Belfast on October 11, 1944, and realised a gross sum of £13,566.

The respondents having been assessed to excess profits tax in the sum of £15,000 for the chargeable accounting period November 24, 1942, to May 30, 1943, in respect of profits arising from the trade of licensed victuallers appealed to the special commissioners who reduced the assessment to £6,325. The respondents required the appeal to be reheard by the County Court Judge for the County of Down, who discharged the assessment but stated this case for the opinion of the High Court. The learned county court judge held that the stock-in-bond was a portion of the testator's stock-in-trade, but that it was not trading stock of the respondents within the meaning of the Finance Act, 1938, s. 26.

The questions raised by the case stated were :—

(1) Whether there was evidence before the county court judge which in point of law justified him in holding that the stock-in-bond was not trading stock of the executors ;

(2) whether the county court judge was correct in point of law in holding that the said stock-in-bond was not trading stock of the executors.

Jones K.C. and *Lowry* for the appellants. There is no evidence upon which to base the conclusion that the stock-in-bond was not stock-in-trade of the executors. The facts as found do not support the decision arrived at : *Dunn's Trust Ltd. v. Williams* (1),

(1) [1950] T.C. Leaflet No. 1524.

Weisberg's Executrices v. Inland Revenue Commissioners (1). The first question means "whether "there were facts as found" to justify the judge in holding as he did. The accounts, though disregarded by the judge, are included in the case. I admit that they are not conclusive but nevertheless a method of keeping accounts is often a guide: *Gold Coast Selection Trust Ltd. v. Humphrey* (2). If there had been evidence in conflict it could have been right to accept that, but in the absence of such evidence the accounts cannot be rejected.

The executors did not by their acts indicate that they intended to keep the bonded stock separate from the stock on the premises. There was nothing in the will to preclude them from resorting to any of the testator's liquid assets for the purposes of carrying on the business. In cases where there is a direction to carry on the business, without other words, the executors have power to carry it on with the assets existing at the testator's death: *In re Chancellor* (3). The test adopted in *Devitt v. Kearney* (4) was "what "were the assets which were embarked upon the trade "at the death?" *O'Neill v. McGrorty* (5) is relevant as setting out the general propositions governing trading by executors.

Patton K.C. and *Bready* for the respondents. Before the Finance Act, 1938, in order to render anyone liable to tax it had to be income that was being taxed, usually under Schedule D. which covered trading. In *Inland Revenue Commissioners v. Nelson* (6) a sale of stock made on the discontinuance of a business was held not to be a transaction in the course of trade. S. 26 of the 1938 Act which provides for the valuation of trading stock on the discontinuance of trades does not apply to cases where a trade carried on by a single individual is discontinued "by reason of his death." That must not be read as "on the occasion of his "death." A trade is not transmissible but is put an end to at the death of the trader. It is a new trade in

(1) (1933) 17 Tax Cases 696.
(2) [1946] 2 All E.R. 742.
(3) (1884) 26 Ch.D. 42.
(4) (1883) 13 L.R. Ir. 45.
(5) [1915] 1 I.R. 1.
(6) (1939) 22 Tax Cases 716.

the hands of the executors. An executor cannot carry on the business of his testator except for the purpose of winding it up : *Collinson v. Lister* (1). A power of sale coupled with a power to postpone sale is not the same thing as a direction to carry on business. Stock-in-bond would be liable for debts as assets but would not thereby become stock-in-trade. When there is a question of whether or not there was evidence to justify a finding the court will only interfere if the conclusion cannot reasonably be drawn from the primary facts. The determination of primary facts is always a question of fact : *Bracegirdle v. Oxley* (2).

Cur. adv. vult.

CURRAN J. [after stating the facts as set out above continued] :

The learned county court judge has incorporated in the case his written judgment which sets out his reasons for finding that the said stock-in-bond was not trading stock of the executors. The first matter that appears to have impressed the learned county court judge was that by his will the late John Smith devised and bequeathed his licensed premises, with the licences and fixtures and fittings attached thereto, unto his trustees upon trust to sell the same and hold the proceeds of such sale for his sons John and Edward in equal shares as tenants in common. This provision, the learned county court judge points out, segregated the licensed premises, licences and fixtures from the liquid assets of the trade, and these assets fell into the residuary estate. The opinion of the learned county court judge clearly was that such segregation took effect from the date of testator's death, and that the liquid assets thereupon ceased to be part of the assets of the business. Accordingly, that when the executors, under the power to postpone said sale given by the will, proceeded to carry on trade, they had no liquid stock-in-trade ; they had merely a right to have recourse to the residuary estate. It followed, the learned county court judge considered, that none of the liquid assets would become trading stock unless and until brought

(1) (1855) 29 Beav. 356. (2) [1947] K.B. 349.

into stock by the executors. The learned county court judge regarded this as clear, as appears from the following extract from his judgment: "What was the "position of the stock-in-bond? Obviously had no "portion of it been used by the executors, it would not "have been 'trading stock' of the executors."

If that was the true legal position, the only evidence tending to establish that the executors had made the stock-in-bond part of their trading stock, is to be found in the accounts relating to the executors' trading, which show the stock-in-bond as part of the stock of the trade; and in the fact that, in an emergency, the executors transferred one quarter-barrel of whiskey from the stock-in-bond to the licensed premises for sale. No record of this transaction appears in the accounts. The learned county court judge attaches little, if any, weight to the entry of the stock-in-bond in the said accounts, and he regards the said transfer of one quarter-barrel of whiskey as a sale by the executors to themselves out of the residuary estate.

What was the legal position with regard to the stock-in-bond? It was admittedly trading stock belonging to the trade carried on by the testator. He undoubtedly, by his will, dealt specifically with the licensed premises, licences, fittings and fixtures, and, without specifically mentioning them, dealt with the stock-in-bond, and even the liquid stock on the licensed premises, as part of his residuary estate. These provisions, however, were subject to the further provisions of the will empowering the executors to postpone sale. It is well established that such a provision authorises the executors to carry on the testator's business for a reasonable period to enable them to sell it profitably. Without reference to any authority on the point I would have thought that, subject to any contrary provision in the will, executors who embark on trade must take over the testator's business as they find it, together with the trading stock belonging thereto. I find, on reference to the authorities, that this view is not without support.

In the case of *In re Chancellor* (1), a testator devised

(1) (1884) 26 Ch.D. 42.

and bequeathed his real and personal estate upon trust for sale and conversion. The will contained the usual power to postpone the sale and conversion of the real and personal estate, and the usual direction (as in the will in the present case) that until sale and conversion the rents, profits, and income thereof should be paid and applied to the same persons and in the same manner as the income of the trust estate. The will contained no reference to the business of the testator which comprised the bulk of his estate. The executors carried on the business and the question arose whether the profits were to be treated as capital or income. The Court of Appeal reaffirmed the principle that a power to postpone sale authorises the carrying on by the trustees of testator's business for a reasonable time to enable them to sell it profitably. Fry L.J. was of opinion that such an authorisation is tantamount to a *direction* to carry on the business. He says (1) : " The " terms of this will seem to amount to a direction by " the testator that under certain circumstances his " business is to be continued. . . ." Then further on in his judgment he says : " I think, therefore, that the " testator has directed that his business shall be " carried on until it is sold. . . ."

In the case of *Devitt v. Kearney* (2) the testator expressly directed in his will that his business was to be carried on by his executors. The testator had carried on his trade in premises of which he was seised for a freehold estate, and these were not devised to the executors. He had deposited the title deeds of these premises with his bankers by way of equitable mortgage. His widow, who proved the will, continued to carry on his trade and after his death she obtained from the bank further advances for the purpose of carrying on the business, on the security of the deeds which remained with the bank. There was a more complete segregation of the business assets than in the present case inasmuch as the legal estate in the premises did not vest in the executrix. It was held, nevertheless that the widow was impliedly authorised to use the premises and to mortgage them for the purpose of carrying on the

(1) Ibid. 47 (2) (1883) 13 L.R. Ir. 45.

business. Law C. says (1): "A direction by a testator "to carry on or continue his business means, I appre- "hend, that it is to be continued or carried on after "his death just as it had been by himself in his lifetime, "and if so, the buildings or other fixed property must "be *used* for the purposes of the business just as he "used them . . .", then further on (2), "The question "is, what is meant by a testator directing the business "to be continued as in his lifetime. This admittedly "devotes the money capital engaged in the business, "and the stock in trade and chattel appliances used "for the trade, to the trust for carrying it on . . .."

With the support I find in these authorities for my own view that the executors took over the testator's business as they found it, together with its trading stock, I am of opinion that the learned county court judge was wrong in law in assuming that the stock-in-bond ceased to be trading stock on the death of testator. In my view it continued to be trading stock belonging to the trade carried on by the executors. Whatever weight is to be given to the entries relating to the stock-in-bond in the accounts of the executors' trading, and to the fact that, in the circumstances already referred to, the executors in the course of their trading used a portion of the stock in bond, both are consistent with the stock-in-bond being trading stock in the hands of the executors and do not, in my opinion, support the conclusions arrived at by the learned county court judge. In my opinion none of the facts found in the case support the conclusion arrived at by the learned county court judge that the said transfer of one quarter-barrel of whiskey from the stock-in-bond to the licensed premises was a sale by the executors to themselves. Nor are there, in my opinion, any facts found in the case to support the conclusion arrived at by the learned county court judge that it was the obvious intention of the executors not to use the stock in-bond for sale on the licensed premises, but to make one large wholesale disposition of this stock-in bond on the rising market occasioned by the war. No doubt the balance of the stock in bond was sold in

(1) Ibid. 49. (2) Ibid. 50.

bulk eighteen months after the sale of the licensed premises, but the evidence establishes that, when the necessity arose, stock-in-bond was used as trading stock by the executors.

On the facts of this case I find it unnecessary to decide the question whether the executors, having embarked on trade, could have separated the stock-in-bond from their trading so that it ceased to be trading stock. If, as Law C. states in *Devitt v. Kearney* (1) (speaking, as he was of a direction to carry on a testator's business), the stock in trade is *devoted* to the trust for carrying on the business, it may be that the trustees, once they have embarked on trade, cannot deal with such stock-in-trade except in the course of trading.

It follows from the conclusions at which I have arrived that the questions of law submitted for my decision must each be answered in the negative. Accordingly, I allow the appeal with costs and the case must be remitted to the learned county court judge to be dealt with in accordance with my findings.

Appeal allowed.
Case remitted.

Solicitor for the appellants : *F. C. MacNeice.*
Solicitor for the respondent : *A. P. Ward.*

S. M. M.

(1) (1883) 13 L.R. Ir. 45, 50.

THE MINISTER OF FOOD v. O'ROURKE (1).

Summary jurisdiction—Charge of aiding and abetting—Proof of participation as principal—Person charged as principal acquitted—Validity of conviction of alleged aider and abettor—Petty Sessions (Ireland) Act, 1851 (14 & 15 *Vict., c.* 93), *s.* 22—*Summary Jurisdiction and Criminal Justice Act (Northern Ireland)*, 1935 (25 & 26 *Geo.* 5, *c.* 13), *s.* 49.

The respondent was charged with aiding and abetting another person to commit an offence against the Defence Regulations. It was found that the other person had not committed any such offence as alleged, but that the respondent had committed the substantive offence himself.

Held, by the King's Bench Division (Lord MacDermott C.J. and Sheil J., Curran J. dissenting), that the respondent could not be convicted on the summons charging him with aiding and abetting.

Per Lord MacDermott C.J.: An accused person is entitled to know the nature of the case he has to face, and an allegation of aiding and abetting will constitute an important element in the description of the offence, especially where the allegation is of aiding and abetting a designated person in doing a particular act. But there may be cases where the line between aiding and abetting and direct participation is so slight that a defendant charged with aiding and abetting can be convicted even if it is proved that he committed the substantive offence.

R. v. Daily Mirror Newspapers Ltd. and Glover [1922] 2 K.B. 530 examined and explained.

CASE STATED by the resident magistrate sitting at Stewartstown Petty Sessions.

The respondent Peter O'Rourke was charged on a summons which recited that a complaint had been made that Thomas O'Rourke, a brother of the respondent, had acted in contravention of the Defence (General) Regulations, 1939, in that he without lawful authority and otherwise than in accordance with the terms of a licence granted by or under the authority of the Ministry of Food or the Ministry of Agriculture did an act preparatory to the commission of an offence

(1) In the King's Bench Division before Lord MacDermott C.J., Sheil and Curran JJ.: June 29, July 31, 1951. (The case was first heard before Sheil and Curran JJ. and had been ordered to stand over for further argument.)

namely, the disposal of meat, such meat not having prior to such disposition been purchased from the said Ministry, or from a person selling on behalf of or under the authority of the said Ministry, and that he (Peter O'Rourke) did aid, abet, counsel and procure his brother in the commission of the said offence.

The summonses against the two brothers came on for hearing at Stewartstown Petty Sessions on October 5, 1949, and that against the respondent was taken first. The magistrate heard the evidence adduced by the complainant against the respondent who adduced no evidence. The magistrate then proceeded to deal with the complaint against the respondent's brother and found that the brother had taken no part in the transaction in question, and he accordingly dismissed the summons against him on the merits. As far as the complaint against the respondent was concerned the magistrate was satisfied that the respondent had done such acts as would have justified a conviction of the offence alleged as a principal party had he been so charged, but as he was not satisfied that he could convict the respondent on a complaint of aiding and abetting he adjourned the case to November 25, 1949. On that day the magistrate heard counsel on behalf of both parties, and in the course of this hearing he offered the complainant an opportunity to amend the summons against the respondent, but this was not accepted. On December 7, 1949, the magistrate gave his decision that he could not lawfully convict the respondent, and he accordingly dismissed the summons but stated this case for the opinion of the High Court on the following questions :—

(*a*) Whether the resident magistrate was right in law in holding that he was precluded from convicting the respondent on a complaint of aiding, abetting, counselling and procuring the said Thomas O'Rourke in the commission of an offence of which the said Thomas O'Rourke had been acquitted ; and

(*b*) Whether the resident magistrate was right in law in holding that he could not convict the respondent as a principal offender because, in

his view, he was not charged in the complaint specifically as a principal offender.

McVeigh K.C. and *MacKeown* for the appellant.

Nicholson K.C. and *Agnew K.C.* for the respondent.

Cur. adv. vult.

LORD MACDERMOTT C.J.: On October 5, 1949, the appellant preferred complaints at Stewartstown Petty Sessions against the respondent and his brother Thomas O'Rourke in respect of an alleged contravention of the Livestock (Restriction on Slaughtering) (Northern Ireland) Order, 1947. A separate summons was issued against each defendant. The complaint in that against Thomas O'Rourke charged him with doing an act, otherwise than under and in accordance with the terms of a licence granted by the Minister of Food or the Ministry of Agriculture, preparatory to the commission of an offence under the said Order. The complaint in the summons against the respondent Peter O'Rourke recited the offence alleged against Thomas and then charged that he, the respondent, "did aid, abet, "counsel, and procure the said Thomas O'Rourke in "the commission of the said offence."

The case against the respondent was heard first, no evidence being given by the respondent or on his behalf. The learned resident magistrate, without coming to a decision on that case, then heard the complaint against Thomas, and being satisfied that Thomas was innocent he dismissed it on the merits. But as regards Peter O'Rourke he says: "I was satisfied on the evidence "that the respondent had done such acts as would "justify me in convicting him of the charge set out in "the complaint before me as a principal party had he "been so charged. . . ." By that I take the resident magistrate to mean that he was satisfied that the respondent had, in fact, done what both summonses alleged Thomas to have done. After argument at a subsequent hearing the case against the respondent was also dismissed on the merits. The grounds for this decision appear sufficiently from the questions of

law submitted by the resident magistrate for the opinion of this court, which are set out as follows in the case stated :

(*a*) Whether I was right in law in holding that I was precluded from convicting the respondent on a complaint of aiding, abetting, counselling and procuring the said Thomas O'Rourke in the commission of an offence of which the said Thomas O'Rourke had been acquitted ; and

(*b*) Whether I was right in law in holding that I could not convict the respondent as a principal offender because, in my view, he was not charged in the complaint specifically as a principal offender."

The appellant has contended that both these questions should be answered in the negative. He did not seek any amendment of the complaint at petty sessions though we were informed by counsel that he was afforded an opportunity of doing so. Before this court he adopted a similar attitude. The burden of his argument throughout has been that the respondent should have been convicted on the complaint as it was presented against him and as it still stands.

In point of law there are no accessories in misdemeanour, and those who aid and abet the commission of offences in this category may be proceeded against and dealt with as principals : see *Du Cros v. Lambourne* (1); section 8 of the Accessories and Abettors Act, 1861 ; and section 22 of the Petty Sessions (Ireland) Act, 1851, as amended by section 49 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935.

This general principle—I shall refer to it hereinafter as "the first principle"—has in my opinion two procedural consequences. One is that a person may properly be charged and convicted in terms appropriate to a principal offender, although found in fact to have participated only as an aider and abettor. The other is that in summary proceedings a person charged as aider and abettor, and proved to be such, may be convicted in terms appropriate to the conviction of

(1) [1907] 1 K.B. 40.

a principal offender without any lack of conformity as between the complaint and the conviction. Having aided and abetted he has committed the offence as completely in point of law as if he had participated as a principal.

These two consequences do not, of course, sustain the appellant's case. If I have followed the argument aright he relies on what he contends is a further consequence of the first principle. If, he says, a person is charged with aiding and abetting the commission of an offence, and the evidence proves that instead of aiding and abetting he was himself a principal offender, then the court can lawfully convict him as a principal offender, and that without any amendment of the complaint.

Now a conviction in such circumstances would not necessarily be out of conformity with the terms of the complaint. As already indicated there is ex facie no inconsistency between a charge that A aided and abetted the commission of a specified misdemeanour and a finding that A committed that misdemeanour. But I do not think this consideration suffices to give the appellant's submission any universal validity, for at this point, as it seems to me, one must have regard to a second general principle of the criminal law, no less important and no less relevant to summary proceedings than that which I have called the first principle. An accused person is entitled not only to know the offence with which he is charged, but to have such particulars thereof as will enable him to appreciate the nature of the case he has to face, to decide what plea he should make and to present such defences as may be open to him. From this principle it follows that a defendant ought not to be convicted on evidence which proves a case substantially different from that which has been alleged against him, unless the court allows an alteration in the terms of the complaint and gives the defendant such further opportunity of meeting the amended charge as is requisite in the interests of justice.

The question, then, is whether this second principle

ought to be invoked in this appeal. As section 39 of the Petty Sessions (Ireland) Act, 1851, goes to show, it is not every variance between the complaint and the evidence adduced in support of it that will bring this principle into play. The variance must, I think, be material in the sense of being such as might tend to prejudice the defendant's rights. In misdemeanour the line between aiding and abetting and some more direct form of participation may, on occasion, be hard to draw, and I am not disposed to hold that the variance between a charge of aiding and abetting and evidence which would justify a finding that the person so charged had acted as a principal offender must always and without exception be regarded as material in this sense. But, on the other hand, an allegation of aiding and abetting may constitute an important element in the description of the offence, and where a defendant is charged with aiding and abetting another, designated, person in the doing of a particular act and the prosecution evidence goes to show that the act was done, not by that other person, but by the defendant himself, I think the variance will in most instances rank as material. A defendant facing such a charge and desiring to contest it will naturally direct his mind to one or both of two defences, the first being that he did not aid or abet the principal offender, and the second that the person he is said to have aided and abetted did not commit the offence alleged; but without prejudging him I do not think it can be taken for granted that a defendant so charged will come to court prepared and ready to meet the case that he himself was the principal offender.

I say "in most instances" because the range of summary offences and the diversity of their attendant circumstances are such that the view just expressed as to what will rank as material may not hold good in every conceivable instance. But if there are exceptions to it this appeal does not, in my opinion, fall among them. On the contrary, the facts here appear to me to point the other way. The complaint preferred against the respondent called for more than proof that the act alleged to constitute the offence was done by

somebody. It hinged on the allegation that the act was done by Thomas O'Rourke while lacking a particular personal qualification, namely, the authority conferred under or by virtue of a licence. Whether the respondent had a licence was not directly in point, for a licence holder may be guilty of aiding and abetting a contravention of the Order in question by one who has not that status. Yet, if the appellant had prevailed in his contention and the respondent had been convicted it would have involved a finding, not merely that he did the act, but that there was no licence under which he was entitled to do it. The appellant urged, in this connection, that the onus was on the party charged to show he had a licence. I express no opinion as to that. But, even if sound, the point does not appear to me to assist the appellant, for I see no reason why the respondent should have sought to prove something which was not necessarily relevant to the charge he had been summoned to meet. Further, it must, I think, be assumed from the course of events and the order in which the summonses were taken that all concerned were agreed that adjudication should await the hearing of both cases. The respondent did not elect to adduce evidence at the conclusion of the testimony led against him by the complainant. For all that appears to the contrary he may have been satisfied that Thomas O'Rourke would be exonerated and that there was no need for him, the respondent, to put forward any further defence, having regard to the nature of the charge he was there to answer. The situation might have developed quite differently had the appellant sought to amend his complaint during or at the end of his evidence. As things were, however, I think the respondent was within his rights in deciding upon his course of action in the light of what had been alleged against him in the summons.

I do not forget that the learned resident magistrate has expressed a view against the respondent on the merits. But that does not determine the present issue. The question for this court is not whether the respondent deserved to be convicted of some offence but whether

his conviction as a principal offender would in the circumstances have been in accordance with law. On principle I am of opinion that it would not.

I do not think any of the numerous authorities cited in the course of the debate shows the contrary. The appellant's case, perhaps, finds most support in the judgment delivered by Lord Hewart, C.J., in *R. v. Daily Mirror Newspapers Ltd. and Glover* (1). Had the defendant company in those proceedings been acquitted I think that decision would carry the appellant a considerable distance in this appeal. But in fact the company was not acquitted. Its conviction was quashed because the indictment against it had not been presented according to law, and that being so I see no reason on the facts of that case why the defendant Glover should not have been convicted as an aider and abettor, as he appears to have been. The part of the judgment relied upon by the appellant was that in which Lord Hewart, speaking of Glover (2), says: "He is charged as an aider and abettor no doubt. He "is charged nevertheless with having participated in "the doing of the acts complained of, and as being in "fact a principal." With every respect I should have thought it would have been more accurate if Lord Hewart had said: ". . . and as being *in law* a principal." But, however that may be, I do not think this passage really advances the appellant's case. Neither it nor the decision itself has, so far as I can see, anything to say to a situation such as the present, which involves the second as much as the first of the principles stated above.

I come now to the questions submitted. In the circumstances of this case and for the reasons I have given I am of opinion that question (*a*) should be answered in the affirmative. I find more difficulty about question (*b*) having regard to the form it takes. If by it the learned resident magistrate intended to raise an abstract point of law I would be in favour of answering it in the negative, for as I have mentioned earlier, I think there is nothing inconsistent between a complaint of aiding and abetting and a conviction in

(1) [1922] 2 K.B. 530. (2) Ibid. 542.

terms appropriate to a principal offender. I am of opinion however, that question (*b*) was not intended to be read apart from the evidence and without regard to the difference between the case made in the summons and the evidence led by the complainant. Reading the question as I think it was meant to be read, it involves the second principle no less than question (*a*), and should, like it, receive an affirmative answer.

For these reasons I would dismiss the appeal.

SHEIL J.: It is beyond dispute that a person who aids and abets in the commission of a misdemeanour may be proceeded against as a principal and as such convicted: *Benford v. Sims* (1); *Du Cros v. Lambourne* (2). If in this case the respondent had been summoned as a principal or if, during the hearing at petty sessions, the summons against him had been amended so as to charge him as a principal, he would not have had any answer to the charge, as indeed the learned resident magistrate has stated. He was, however, charged specifically as an aider and abettor of one Thomas O'Rourke who, it was found as a fact, had taken no part whatever in the alleged offence and as to whom the charge was dismissed.

It is said that the present respondent should, nevertheless, have been convicted on the summons against him which, as I have said, was one for aiding and abetting the said Thomas O'Rourke, and cases have been cited to us in which occur passages which appear to support that proposition. I have carefully considered those cases and I have, with regret, come to the conclusion that those passages do not carry the case for the appellant.

In the cases of *R. v. Taylor and Shaw* (3) and *R. v. Burton* (4), it is clear that the aiders and abettors were indicted as principals and any dicta there to be found must be considered in the light of the actual proceedings since in each case it was the conviction on

(1) [1898] 2 Q.B. 641.
(2) [1907] 1 K.B. 40.
(3) (1785) 1 Leach 360.
(4) (1875) 13 Cox C. C. 71.

the indictment that was in question. *Reg. v. Wallis* (1) does not set out the indictment in full. The note of the case is very short and, having regard to the formality with which indictments were then drawn, I am not prepared to assume that while Wallis may have been described as having aided and abetted or as an accessory he was not, as in the *Taylor* case (2), charged with murder.

Gould v. Houghton (3) is authority for saying that an aider and abettor is so much a principal that he can take advantage of any limitation-period of which the actual principal could take advantage. The point in issue here, however, was not there involved since in that case there had been a conviction against the actual principal, and without doubt there could have been a conviction for aiding and abetting but for the limitation of time.

In *R. v. Daily Mirror Newspapers Ltd. and Glover* (4) the company was indicted for an offence and Glover was charged on the same indictment for aiding and abetting. The Court of Criminal Appeal quashed the conviction of the company, not on the ground that the company had not committed the offence charged but on the technicality that a company could not be committed for trial. In other words, though the company had committed the offence it was not possible legally to convict it. Thereupon it was argued that Glover's conviction as an aider and abettor of the company should not stand. The argument was rejected, Lord Hewart C.J. stating that: "In the "opinion of the Court it is not the case that Glover's "liability is dependent upon that of the defendant "company. He is charged as an aider and abettor "no doubt. He is charged nevertheless with having "participated in the doing of the acts complained of, "and as being in fact a principal".

This passage was strongly relied on by the appellant, and until I read *Thornton v. Mitchell* (5) I was of opinion that these dicta might well conclude the present case

(1) (1703) 1 Salk. 334.
(2) (1786) 1 Leach 360.
(3) [1921] 1 K.B. 509.
(4) [1922] 2 K.B. 530.
(5) [1940] 1 All. E.R. 339.

against the respondent. In *Thornton's* case (1) Lord Hewart was a member of the court as he had been in *Glover's* case (2). He cited, with approval, a passage in the judgment of Avory J. in *Morris v. Tolman* (3), where it was said: "in order to convict, it would be "necessary to show that the respondent was aiding "the principal, but a person cannot aid another in "doing something which that other has not done." Lord Hewart then proceeded: "That, I think, is the "very thing which these justices have decided that "this bus conductor did. In one breath they say that "the principal did nothing which he should not have "done, and in the next breath they hold that the bus "conductor aided and abetted the driver in doing "something which had not been done or in not doing "something which he ought to have done".

It seems to me that those last mentioned dicta can be reconciled with Lord Hewart's observations in *Glover's* case (2) if one has regard to the fact that in *Glover's* case (2) the principal offender (the company) had in fact committed the offence charged but had escaped liability on the technicality already mentioned. If they cannot be so reconciled I have to say that I prefer the later opinions, and, indeed, I respectfully agree with my Lord's comment on the passage cited from the judgment of Lord Hewart in *Glover's* case (2).

An earlier passage in the judgment of Avory J. in *Morris v. Tolman* (3) has also been relied on by the appellant. That learned judge said: "The justices "proceeded on the principle that a person charged as "an aider and abettor cannot be convicted if the "principal is acquitted. As an abstract proposition "that cannot be supported, for in all offences below "felony any person aiding and abetting or counselling "and procuring, the commission of the offence may be "convicted either as principal or as aider and abettor." The learned judge cited *R. v. Burton* (4) as authority for that statement. But, as we have seen, Burton was in fact indicted for and convicted of the substantive offence though his part was that of aider and

(1) 1940 1 All. E.R. 339.
(2) [1922] 2 K.B. 530.
(3) [1923] 1 K.B. 166, 171.
(4) (1875) 13 Cox. C.C. 71.

abettor. He was charged and convicted as a principal. Further, I venture to think that the learned judge had in mind cases where there was in fact aiding and abetting as there was in all the cases cited to us.

With the exception of *Glover's* case (1) no authority has been cited to us where an aider and abettor so charged has been convicted as such after the acquittal of the alleged principal offender. This I think remarkable if the case made for the appellant be correct because, as I have tried to indicate, the facts in *Glover's* case (1) were quite exceptional.

A further point arises. Assuming that the learned resident magistrate had convicted the respondent on the summons as framed it would have been interesting to see the form of the order. The summons was the complaint. The order book at petty sessions and any certificate of the order would contain a statement of the cause of complaint, that is, a statement of the contents of the summons. It would, therefore, contain an allegation that Thomas O'Rourke committed an offence—which would be quite untrue. How the order of conviction could be drawn to avoid repetition of that untruth I am quite unable to say. Lord Goddard C.J., said in *Edwards v. Jones* (2): "It is "elementary law that a conviction always follows the "information." This is perhaps quite a technical point, but in *Glover's* case (1) Lord Hewart said "an "argument though technical may be valid in law."

In my opinion the questions submitted should be answered in the affirmative.

CURRAN J. [after stating the facts continued]:

It is contended on behalf of the respondent that he was not charged as a principal offender but merely as an aider and abettor and that accordingly, as it had been established that he was not an aider and abettor, he could not be convicted as a principal.

It has long been recognised that in misdemeanour all who participate in the commission of the offence are to be treated as principals see the judgments in *Gould & Co. v. Houghton* (3), in which the cases on the

(1) [1922] 2 K.B. 530, . (3) [1921] 1 K.B. 509.
(2) [1947] K.B. 659, 665.

subject are reviewed. It is for this reason that it was conceded at the bar that had the respondent been charged as a principal he could have been convicted as such even had it been proved that he acted merely as an aider and abettor. For the same reason it was further conceded that had the respondent been proved to have aided and abetted someone other than Thomas O'Rourke in the commission of the offence, the fact that the complaint charged the respondent with aiding and abetting Thomas O'Rourke would not have precluded the resident magistrate from convicting. But, say counsel for the respondent, when you charge a person as an aider and abettor and fail to prove that he aided and abetted in the commission of the offence he cannot be convicted, notwithstanding the fact that he is clearly proved to have committed the offence as a principal.

I cannot accept that view of the law. In my opinion the substance of the complaint in the present case is that the respondent participated in the commission of the offence. No doubt he is charged with participating therein in a particular manner, namely, by aiding and abetting, counselling and procuring Thomas O'Rourke; nevertheless he is in substance charged with participating in the commission of the offence, and in my view it is open to the prosecutor on such a complaint to establish the substance of the charge, namely, the respondent's participation, whatever be the manner thereof. This was the view taken by the Court of Criminal Appeal in England in *R. v. Daily Mirror Newspapers Ltd. and Glover* (1). The facts were that a limited company was charged before a justice with an offence under section 34 of the Representation of the People Act, 1918, and a servant of the company was charged with aiding and abetting the company therein. An indictment was presented against both the defendants in which they were respectively charged as aforesaid, and they were both thereupon tried and convicted. On appeal by both defendants to the Court of Criminal Appeal it was held that as against the defendant company the indictment and the con-

(1) [1922] 2 K.B. 530.

viction must be quashed, inasmuch as a limited company could not be committed for trial; but that although the other defendant was charged with aiding and abetting the defendant company, it did not on that account follow that the indictment and conviction must be quashed as against that defendant also.

In delivering the judgment of the court Lord Hewart C.J. says (1):—

"It is apparent that there was ample evidence "on which the jury could find that the defendant "Glover, with full knowledge of what he was doing, "took part in the issuing of these publications, and "was a party to the doing of the acts of which "complaint is made.

"Finally, it is said that as the defendant company "has succeeded in escaping conviction on the ground "already stated, and as the defendant Glover was "charged only as an aider and abettor of the com-"pany, it follows that his conviction must also be "quashed. In the opinion of the Court it is not the "case that Glover's liability is dependent upon that "of the defendant company. He is charged as an "aider and abettor no doubt. He is charged never-"theless with having participated in the doing of "the acts complained of, and as being in fact a "principal. There is, in the opinion of the Court, "no reason for interfering with the conviction of "the defendant Glover."

Adopting, as I do, this authoritative statement of the law, I do not deem it necessary to review the many cases to which counsel have referred. Having regard, however, to the stress laid by the resident magistrate and by counsel for the respondent on a statement of Avory J. in *Morris v. Tolman* (2), that case requires a more detailed reference.

The facts were that an information was preferred against the owner of a motor vehicle charging that he had on a certain day used it for a purpose other than that for which it was licensed and chargeable at a higher rate of duty, and also charging the respondent with aiding and abetting the commission of the offence.

(1) Ibid. 541, 542. (2) [1923] 1 K.B. 166, 171.

The justices dismissed the information against the owner, and being of opinion that having dismissed it as against him, they had no power to convict the respondent for aiding and abetting; they also dismissed the information as against the respondent. It was held by the Court of Appeal that the language of section 8 sub-section 3 of the Roads Act, 1920, showed that it was limited to persons holding a licence for a vehicle, and that inasmuch as the respondent was not the holder of the licence, he was not liable to be convicted.

Lord Hewart C.J. in his judgment puts the very question raised in the present case. He says (1): "The justices came to the conclusion that Jeffries, "who was the owner of the vehicle, was not guilty, "and they dismissed the information as against him. "The question then arose whether the respondent "could be convicted either as a principal or as aider "and abettor, and the justices were of opinion that, "having dismissed the information as against the "principal, it was impossible for them to convict "another person as aider and abettor, and they "accordingly dismissed the information as against the "respondent. The question is whether it was open to "the justices to convict the respondent. They were "of opinion that it was impossible for them to do so. "If that was intended to be a general opinion, it cannot "be supported. It does not in the least follow because "a principal is acquitted that another person may not "be convicted for aiding and abetting." And later Lord Hewart says (2): "In misdemeanour there is no "distinction between a principal and an aider and "abettor. The person charged may be convicted "either as principal or as aider and abettor. . . . In "this case if the aider and abettor were to be convicted, after the dismissal of the information against "the principal, it must be upon the footing that the "respondent was a principal." Lord Hewart then went on to discuss whether it was possible for the respondent to have committed the offence described and continued: "The respondent must be treated as "if he were a principal and as it is not possible that he

(1) Ibid. 169. (2) Ibid. 170.

" could have been convicted under section 8 sub-
" section 3, as a principal, he cannot, in my opinion,
" be convicted as an aider and abettor."

Lord Hewart appears to have seen no difficulty in the way of convicting the respondent as a principal if he were guilty, notwithstanding the fact that the information merely charged him as an aider and abettor.

Avory J. in his judgment says (1) : " I am of the
" same opinion. The justices proceeded on the
" principle that a person charged as an aider and
" abettor cannot be convicted if the principal is
" acquitted. As an abstract proposition that cannot
" be supported, for in all offences below felony any
" person aiding and abetting, or counselling and pro-
" curing, the commission of an offence may be con-
" victed either as principal or as aider and abettor :
" *Reg. v. Burton* (2) " The learned judge then proceeds to deal with the point that only the owner could commit the offence under section 8 sub-section 3 of the Roads Act, 1920, and points out that in order to convict the respondent (presumably as a principal) it would be necessary to substitute certain words in sub-section 3, he then makes the statement, relied upon by the resident magistrate and by counsel for the respondent : " Moreover, in order to convict, it would
" be necessary to show that the respondent was aiding
" the principal, but a person cannot aid another in
" doing something which that other has not done."
Avory J. then continues to discuss further reasons why the respondent could not be held to have been using the vehicle in a way to bring him within section 8 sub-section 3.

It is significant that Avory J. discusses the possibility of convicting the respondent either as having aided or abetted or as a principal although the respondent was merely charged with aiding and abetting. I take the view that in making the statement that it was necessary to show that the respondent was aiding the principal Avory J. had in mind the question as to whether the respondent could be convicted for aiding and abetting

(1) Ibid. 171. (2) [1875] 13 Cox C.C. 71.

in the special circumstances of that case.

The same comment may be made as regards the quotation of that statement by Lord Hewart C.J. in *Thornton v. Mitchell* (1). As in *Morris v. Tolman* (2) that was a case in which the only person who could have committed the offence was found not guilty and, accordingly, the person charged with aiding and abetting could not be convicted either as an aider or abettor or as a principal.

I do not find in the judgments quoted above nor in any of the cases referred to by counsel any dictum which contradicts or is inconsistent with that of Lord Hewart C.J. in *R. v. Daily Mirror Newspapers Ltd. and Glover* (3) already quoted in this judgment.

Accordingly I am of opinion that the resident magistrate was wrong in law in holding that he was precluded from convicting the respondent, being satisfied on the evidence, as he was, that the respondent had participated in the commission of the offence charged.

It was suggested in argument that, inasmuch as the order book at petty sessions and any certificate of this order must contain a statement of the cause of complaint as set out in the summons, the resident magistrate could not convict the respondent as a principal without first amending the summons. To my mind this is merely a question of procedure which does not touch the substance of the questions of law raised by the case stated. If it is necessary, for the reason suggested, to amend the summons, the resident magistrate has ample powers to enable him to do so. Whether such amendment is made or not I apprehend that in a case where a person is charged as an aider and abettor, and the resident magistrate is satisfied that he participated in the commission of the offence as a principal, the resident magistrate will ensure, before proceeding to a conviction, that the person charged has an opportunity of making his defence on the basis that he can be convicted as a principal.

(1) [1940] 1 All E.R. 339, 341.
(2) [1923] 1 K.B. 166.
(3) [1922] 2 K.B. 530.

In my opinion the questions submitted for the opinion of the court should be answered in the negative, and for these reasons I would allow the appeal.

Appeal dismissed.

Solicitor for the appellant : *John T. McConnell.*

Solicitors for the respondent : *W. J. Irwin & Sons.*

J. P.

HARRY FERGUSON (MOTORS) LTD. v. COMMISSIONERS OF INLAND REVENUE (1).

Revenue—Excess profits tax—Capital or income.

The managing director of a company having made inventions and taken out patents in his own name in relation to a plough entered into agreements with the company under which the company received payments out of the profits which the managing director made from exploiting the patents. The company submitted that the sums received under these agreements were payments for the sale of the capital asset of the company's interest in the patents, but the Crown contended that the sums were a share of profits from a commercial venture and were therefore liable to assessment for excess profits tax.

Held, that on the true construction of the agreements the payments were income and liable to assessment.

There is no single test for determining whether a receipt is of an income or capital nature. The use of the words "income" or "capital" in the agreement under which the payment is received is not necessarily conclusive. What is paid out of profits may not be income; and what is paid as consideration for a capital asset may be received as income. All the relevant circumstances must be considered and a conclusion reached according to their general tenor and combined effect.

Decision of Sheil J. reversed.

CASE STATED by the Commissioners for Special Purposes of the Income Tax Acts and thereafter appeal to the Court of Appeal.

The appellant company was incorporated as a private company in 1911 and its business consisted chiefly of selling and repairing motor vehicles and their accessories and mechanically drawn agricultural implements and machinery. During the first World War Harry Ferguson, then managing director of the company, conceived the idea of a new mechanical plough, and by 1918 he had taken out in his own name two patents in respect of ploughs upon which he had worked on the company's premises with the company's materials and with the assistance of some of the company's servants.

(1) In the King's Bench Division (Revenue) before Sheil J., Jan. 23, 24, 25, 26, 27, 30, 31, Feb. 1, June 23, 1950. In the Court of Appeal before Lord MacDermott C.J., Porter and Black L.JJ., April, 23, 24, 25, 26, 27, 30, May 1, 1951.

On September 13, 1918, Ferguson and the company entered into two agreements whereby it was agreed that Ferguson stood possessed of the patents in trust for the company for a period of two years from the granting of the patents. Pursuant to these agreements the company tried to exploit the patents but owing to imperfections in the machines it made losses and within a few years ceased to manufacture any more.

Between 1918 and 1921 Ferguson made further experiments and took out three further patents. By October, 1921, the two agreements of 1918 had expired and negotiations for a new agreement concluded in an agreement of November 30, 1923, as follows: —

"MEMORANDUM OF AGREEMENT entered into the "Thirtieth day of November one thousand nine "hundred and twenty-three Between HARRY "FERGUSON of the City of Belfast Engineer of the "one part and HARRY FERGUSON LIMITED having "its registered Office at May Street, in the City of "Belfast aforesaid (hereinafter called the Company) "of the other part WHEREAS the said Harry "Ferguson has invented a certain Agricultural "Implement (hereinafter referred to as 'the Plough') "and has secured patents upon said device in certain "Countries and has other applications for patents "pending in connection therewith AND WHEREAS "the Company has from time to time permitted the "said Harry Ferguson to utilise his time and talents "at the Company's expense in relation to said "Plough and Patents and has otherwise assisted "and facilitated the said Harry Ferguson in con-"nection with the Plough and Patents AND "WHEREAS the said Harry Ferguson has entered "into certain agreements for the manufacture and "marketing of the Plough AND WHEREAS the "parties hereto are desirous of making provision for "remunerating the Company for its services and "assistance as aforesaid AND WHEREAS the Com-"pany has agreed at the request of said Harry "Ferguson to allot to Mr. W. K. Gibson, the Solicitor "for the Harry Ferguson Limited for cash a further "four hundred and forty Ordinary Shares in the

" Company to bring his shareholding interest therein " to Five hundred pounds and the said Harry " Ferguson has for the considerations herein referred " to agreed to pay to Harry Ferguson Limited One " hundred and five thousand three hundred and " fifty pounds as herein provided Now It Is " HEREBY AGREED by and between the Parties " hereto as follows :—

" 1. The said Harry Ferguson shall continue the " manufacture and marketing of the Plough either " through agents or otherwise as he may determine " and shall keep or cause to be kept proper records " which shall clearly show the profits therefrom and " shall make or cause to be made to the Company " monthly returns showing full and accurate in- " formation in connection with such manufacture " and marketing.

" 2. The said Harry Ferguson shall be entitled to " receive a salary of One thousand pounds per annum " increasing to One thousand two hundred pounds " per annum as may be agreed to by the Company " and after payment of such salary and other " necessary and proper expenses out of the Plough " receipts or earnings the profits from the Plough " shall be applied in the following manner, viz. :—

" *First* :—As to ninety per cent. of such profits " such to be paid to the Company until such " payments in respect of such ninety per cent. of " such profits are made by said Harry Ferguson " to the Company to the amount of Twenty-one " thousand pounds and interest upon such sum of " Twenty-one thousand pounds or balance due in " respect thereof calculated from the date of these " presents at Seven pounds ten shillings per cent. " per annum until repayment of the said sum of " Twenty-one thousand pounds and all interest " accrued thereon, and as to the remaining ten " per cent. such to be paid to the said Harry " Ferguson ; and

" *Secondly* :—After the said sum of Twenty-one " thousand pounds and interest already referred " to shall have been repaid the said profits shall be

" applied, as to fifty per cent. thereof to the " Company and as to the remainder to the said " Harry Ferguson until such time as the Company " shall have received under the terms of these " presents the full sum of One hundred and five " thousand three hundred and fifty pounds in " addition to such sums as may be paid to it in " respect of interest after this date but including " the repayment of the said sum of Twenty-one " thousand pounds and thereafter as to the whole " of the said profits to the said Harry Ferguson.

" PROVIDED ALWAYS AND IT IS HEREBY AGREED " AND DECLARED That in the event of said Harry " Ferguson having to pay American Income Tax " upon the said sum of One hundred and five " thousand three hundred and fifty pounds the said " sum shall be reduced by the proportion which the " amount of such Tax bears to a sum of Eighty-four " thousand three hundred and fifty pounds (being " the balance of said sums of One hundred and five " thousand three hundred and fifty pounds after " deducting therefrom the sum of Twenty-one " thousand pounds so advanced as aforesaid).

" 3. The profits herein referred to shall include all " profits arising from the Plough and from the " manufacture and sale thereof and from the existing " patents relating to the Plough in the name of the " said Harry Ferguson and any improvements or " improvement made or to be made thereon by said " Harry Ferguson as well as from any further " patents in connection with the Plough or improvements thereon taken out by him or on his behalf " as well as all profits from any plough invented or " to be invented by Harry Ferguson until said sum " of £105,350 has been repaid.

" 4. The payments to be made to the Company " under the provisions of Clause 2 hereof shall be " made monthly on the first day of each month.

" 5. The said Harry Ferguson undertakes and " agrees that he will not without the written consent " of the Company mortgage charge or pledge his " interest in the subject matter of this agreement or

" dispose by sale or otherwise of his said interest " without such written consent unless and until all " moneys payable to the Company shall have been " first fully discharged.

" 6. The said Harry Ferguson undertakes and " agrees that he will at all times until all moneys " payable to the Company shall have been fully " discharged faithfully and conscientiously use his " best endeavours in every sense in doing all such " matters and things as will expedite as much as " possible the repayment to the Company as soon as " possible of all moneys payable to the Company."

Pursuant to this agreement Ferguson continued the manufacture and marketing of the plough and began to pay the company the sums as covenanted.

Later further questions arose between the two parties and on April 27, 1927, a supplementary agreement was entered into as follows :—

" MEMORANDUM OF AGREEMENT entered into the " 27th day of April 1927 BETWEEN HARRY FERGUSON " of the City of Belfast Engineer of the one part and " HARRY FERGUSON LIMITED an Incorporated Com- " pany having its registered office at 83 May Street, " Belfast aforesaid (hereinafter called the Company) " of the other part SUPPLEMENTAL to a Memo- " randum of Agreement dated the 30th day of " November 1923 entered into between the same " parties and hereinafter referred to as ' the Plough " 'Agreement.' WHEREAS questions have arisen " between the said parties as to the construction of " the Plough Agreement and as to the ownership " the Plough patents herein referred to and in order " to dispose of such questions the said parties have " agreed to enter into these presents NOW IT IS " HEREBY AGREED by and between the parties " hereto as follows :—

" 1. The said Harry Ferguson stands possessed " of the Plough Patents in trust for the Company " as from 30th September 1923 until the Company " shall have received as income therefrom a sum

" of £105,350 and interest as provided in the " Plough Agreement.

" 2. In consideration of the services already " given by the said Harry Ferguson in connection " with the Plough Patents and the Manufacture " and Sale of the Plough in the United States of " America and elsewhere and the further services " to be hereafter given by him in connection " therewith the said Harry Ferguson shall be " entitled to receive in addition to the salary " provided for in the Plough Agreement and until " the time when the Company shall have received " payments totalling £21,000 and interest as pro- " vided in the Plough Agreement as further or " additional remuneration a sum equivalent to " 10 per cent. of the profits from the Plough after " payment of his said fixed salary and other " necessary and proper expenses and from the " time the Company shall have received said sum " of £21,000 and interest as aforesaid until the " Company shall have received the full sum of " £105,350 in addition to interest as provided for " in the Plough Agreement, the said Harry " Ferguson shall be entitled to receive in addition " to his said fixed salary as further or additional " remuneration a sum equivalent to 50 per cent. " of the said profits after payment of said salary " and other necessary and proper expenses.

" 3. When the Company shall have received " said sum of £105,350 and interest as aforesaid " the Company shall transfer release and make over " to the said Harry Ferguson absolutely all the " interest of the Company in and to said Plough " Patents.

" 4. The Company shall not without the written " consent of said Harry Ferguson mortgage charge " or pledge its interest in the subject matter of this " agreement or dispose by sale or otherwise of its " said interest.

" 5. The terms and conditions of the Plough " Agreement as amended by these presents shall

" be binding upon the executors administrators
" and assigns of said Harry Ferguson and upon the
" successors and assigns of the Company.
" 6. As amended by these presents the Plough
" Agreement shall continue in full force and effect."

Following this agreement Ferguson continued the manufacturing and selling of the plough. Up to 1935 the sums received by him and passed on to the company were relatively small. On December 2, 1935, another supplementary agreement was entered into as follows :

" AGREEMENT made this 2nd day of December
" 1935 BETWEEN HARRY FERGUSON of the one part
" and HARRY FERGUSON LIMITED of the other part
" Supplemental to Plough Agreements dated 30th
" day of November 1923 and 27th day of April 1927
" made between the parties hereto Whereby it is
" agreed by and between the parties hereto that in
" consideration of the further services afforded and
" rendered by said Harry Ferguson Limited to said
" Harry Ferguson the said Harry Ferguson hereby
" agrees to pay to the said Harry Ferguson Limited
" the further sum of £80,000 over and above all
" other sums heretofore provided to be paid by said
" Harry Ferguson to said Harry Ferguson Limited.
" This and the previous Agreements between the
" parties to be binding upon the Executors adminis-
" trators and assigns of said Harry Ferguson and
" upon the Successors and assigns of said Harry
" Ferguson Limited."

After 1935 Ferguson began to receive very large sums from the manufacture and sale of the plough, and in due course he received more than the sums of £105,350 and £80,000, and he paid over to the company all sums received by him. The company retained thereout sums aggregating £105,350 and £80,000 (together with interest on £21,000, being part of the £105,350) and paid back the balance to Ferguson. The question having been raised whether these sums were liable to assessment for excess profits tax the Special Commissioners held that all the sums, including the interest on the £21,000, should be included as receipts of the company's trade or business in reckoning its profits

for the purpose of the tax, but stated a case for the opinion of the King's Bench Division of the High Court.

Patton K.C., Nicholson K.C. and *Gibson* for the company.

Harrison K.C. and *Lowry* for the Crown.

SHEIL J.: This is an appeal by way of case stated from a decision of the Special Commissioners with which the appellants have expressed dissatisfaction.

It is unnecessary to go into the history of the company which has been admirably set out in the case stated but certain matters must be noticed. At all material times one Harry Ferguson has been a substantial shareholder in the company and was indeed for a considerable period its managing director, an office which he no longer holds.

While employed as the company's managing director, Harry Ferguson, using the company's time (in the sense of time for which the company was paying him), the company's premises, materials, apparatus and some of its staff, developed and brought into existence certain ideas, the creatures of his mind, for the improvement of ploughs. From time to time, all the circumstances *qua* the company remaining the same, he improved on those ideas and perfected and patented better ploughs and eventually he has been able to manufacture and market those ploughs, principally in the United States of America, on a very large scale, as a result of which very large sums of money have been earned. A part—it may be an inconsiderable part—of those large sums has been paid to the company for its own benefit by virtue of certain agreements to which I shall have later to refer and the question raised in the appeal is whether the sums so paid by Harry Ferguson to the company fall to be included as receipts of the company's trade or business in computing its profits for the purpose of assessment to excess profits tax. The Special Commissioners have answered that question in the affirmative.

It seems to me that the first matter to be determined

in the case is, what were the respective interests and rights of Harry Ferguson and the company in and to these patents and their fruits? The Special Commissioners considered that the Company did not have any interest or right but only strong moral grounds for asking for a share in any profits which might accrue. This view coloured and, if it is correct, rightly coloured the approach of the Special Commissioners to the solution of the whole problem of liability but on a careful consideration I am unable to accept that view. It is well established law that any invention or discovery made by an employee in circumstances similar to those here may be the property, not of the employee, but of the employer. I need only refer to *Worthington Pumping Engine Co. v. Moore* (1), and *Triplex Safety Glass Co. v. Scorah* (2). Where, as here, the employee was not in a subordinate position but was managing director of the company and the circumstances were such as those already noticed with the addition that the employee, by reason of his status with the company, could direct both labour and materials I am of opinion that the company could successfully have maintained an action claiming the beneficial interest in such invention or discovery. From the documents in or attached to the case stated it is certain that the directors assumed that the company had, if not the exclusive interest, at least a considerable interest in the plough. Reference may be made to extracts from the minutes of meetings held between November 15, 1916, and August 21, 1923, and, in particular, to those of June 11, 1918, January 10, May 3, July 11, and December 12, 1922, and January 31, 1923. When we come to the minutes of the meeting of directors held on October 3, 1923, and read them in conjunction with the evidence of Mr. J. M. Thompson it is obvious that some at least of the directors were asserting the company's claims with considerable vehemence.

In that condition of affairs the agreement of November 30, 1923—what I may call the main agreement—was executed. It is indeed difficult firmly to rest any

(1) (1902) 19 T.L.R. 84. (2) [1938] Ch. 211.

judgment on that document considered by itself and the difficulty is not lessened by consideration as the documents invite consideration, of that agreement with those of April 27, 1927, and December 2, 1935. But in considering the agreements one must have regard not only to the facts recited in the case but to the inference which, in my view, should be drawn from them. These agreements, albeit drawn by a solicitor, were not agreements entered into between parties who were at arm's length. The directors and Harry Ferguson must have been old friends; they had all worked together to advance this company's interests—even the solicitor had a personal interest. Mr. Harrison has very properly drawn my attention to the precedents to be found in the Encyclopaedia of Forms and Precedents applicable respectively to "sale" and "mortgage" and has contrasted those precedents with the form of this agreement. But as I have said these parties were not at arm's length; they were settling a hotly disputed argument, and I am unconscious of showing disrespect to the observations in *Inland Revenue Commissioners v. Duke of Westminster* (1), in having regard to these various considerations, particularly in view of the observations of Greene M.R. in *Inland Revenue Commissioners v. Mallaby-Deeley* (*Personal Representatives*) (2).

Bearing in mind these considerations I read the first agreement. It recites the invention and the patents secured on it by Harry Ferguson, that the company had allowed him to utilise his time and talents at the company's expense and that the company had otherwise assisted and facilitated Harry Ferguson in connection with the plough and patents and that Harry Ferguson had entered into certain agreements for the manufacture and marketing of the plough. There we have a statement of facts which, to my mind, brings the case within the principles of the *Worthington* and *Triplex* cases. There follows a recital that the parties desire to make provision for remunerating the company for its services and assistance as aforesaid and that Harry Ferguson has for the considerations referred to agreed to pay to

(1) [1936] A.C. 1. (2) [1938] 4 All. E.R. 818.

the company £105,350. As Sir Wilfrid Greene M.R. observed in *Inland Revenue Commissioners v. British Salmson Aero Engines Ltd.* (1), the payment "starts "off by being a lump sum." So far the suggestion is payment for services rendered—an ordinary business arrangement. But if that be the reality of the transaction what interest could the company have in knowing the profits (clause 1) and why should the amount be payable out of the profits and why should those profits include those arising from any future improvement or patent as to which the company may not render any assistance whatsoever. The truth is that—probably of set purpose—this agreement has been very loosely drafted. I say, probably of set purpose, because for the reasons stated, I believe that it was desired to avoid any explicit statement as to the ownership of the invention and patents in view of what had happened at the meeting of November 3, 1923, and thus enable the parties to continue their friendly relationship.

That view is supported by the recital in the agreement of April 27, 1927, that questions had arisen as to the ownership of the plough patents. Again I have to say that this agreement also is an unhappily phrased document with its references to "trust," "income" and "ultimate transfer of the company's interests in "and to the said plough patents." But we know that questions as to the ownership had arisen in and before November, 1923, and if Harry Ferguson was the beneficial owner of the patents why the need for this agreement at all? The 1923 agreement was still in force and binding. All that had happened was that the acrimony of late 1923 had gone.

The agreement of December 2, 1935, throws no further light on the matter. Construed by itself it merely provides for a payment of an additional sum of £80,000 for services rendered but it is provided that it is to be read with the antecedent agreements.

Mr. Harrison says that the true construction of the agreements and the real nature of the entire dealing

(1) [1938] 2 K.B. 482, 495.

between the parties was an arrangement to share profits up to a ceiling of £185,350 and after that all the profits were to go to Harry Ferguson and that in order to discover whether the sums in issue were capital or income one must look at them from an accountancy point of view and he drew my attention to *British Sugar Manufacturers Ltd. v. Harris* (1) and *Inland Revenue Commissioners v. British Salmson Aero Engines Ltd.* (2). With all respect to his very able and careful argument it seems to me that his second proposition rather begs the question because the true nature from an accountancy point of view is one of fact. As to his first proposition on this part of the case I have to say that the most diligent search on my part has failed to discover any case where there was a share of profits with a ceiling. That is not to say that such a case may not occur—merely that it must be an anomaly.

Referring again to *Inland Revenue Commissioners v. British Salmson Aero Engines Ltd.* (3), it will be seen that the Master of the Rolls said that the question whether a payment is capital or income has to be decided on the particular facts of each case, including in those facts the contractual relationship between the parties, and that there may be cases where the construction of the contract is of itself the really decisive matter in answering any question of law which may have to be discussed and decided, in deciding the question of fact. Further, in *Inland Revenue Commissioners v. Mallaby-Deeley* (4) he said that "the "distinction which is to be drawn for the purposes "of the Income Tax Acts between payments of "an income character and payments of a capital "nature is sometimes a very fine and rather artificial "one. It may—in fact, it does—depend upon the "precise character of the transaction. To take a "simple case, if the true bargain is that a capital "sum shall be paid, the fact that the method of "payment which is adopted in the document is "that of payment by instalments will not have the "effect of giving to those instalments the character

(1) [1938] 2 K.B. 220.
(2) [1938] 2 K.B. 482.
(3) [1938] 2 K.B. 482, 499.
(4) [1938] 4 All. E.R. 818, 823.

" of income. Their nature is finally determined by the " circumstance that the obligation is to pay a capital " sum, and instalments are merely a method of effecting " that payment " ; and later (1) : " It is not disputed " that a covenant to pay a lump sum by instalments " is a covenant of a capital nature. It may be the " purchase price of a business. It may be a pre- " existing debt, and that particular method of liquidat- " ing it may have been selected." It may be further observed in that case that the Master of the Rolls paraphrases a part of the argument of counsel for the appellants as relying on the fact that there was not, in the deed under consideration, any reference to a lump sum. In the present case there is first the ascertainment of the lump sum and then payment of that sum by instalments. In *Inland Revenue Commissioners v. Ramsay* (2), Lord Wright adopting a passage from Lord Halsbury's speech in *Scoble's* case (3), proceeds : " That " is a general test which may be, and has been, found " very difficult to apply and I do not wish to suggest " that there are any hard and fast rules which can be " applied as a matter of course to any case. For instance, " it cannot, I think, be said as a general rule that, if the " amount of the instalments is one which is to fluctuate " during the period in which they are payable according " to certain circumstances, that is necessarily incon- " sistent with these instalments being instalments of " capital, and that it necessarily involves that they " must be treated as annual payments or annuities."

Applying these dicta as best I can to the present agreements with all their infirmities and bearing in mind that the surrounding circumstances must be regarded in construing them, which means that I should have regard to the background which I have already mentioned, it seems to me that the true nature of the entire transaction was that the company relinquished any rights which they had or might have in the plough for a fixed or lump sum payable by instalments, and in that context I must not lose sight

(1) Ibid. 824.
(2) (1935) 20 Tax Cases 79, 93.
(3) [1903] A.C. 299, 303.

of the fact stressed by Mr. Patton that from the time of the agreements no effort was made by the company to produce any ploughs nor does it appear that they claimed any right so to do. True it is that the payment was expressed to be paid out of the profits but so it was in *Ramsay's* case (1), and if, after one or all of these agreements had been executed, Harry Ferguson had chosen to pay off in one payment the whole sum or any part remaining unpaid, I am unable to see how the company could have said to him : " We won't take " this sum because it is not being paid out of profits." They were entitled to £185,350 and no more (with, of course, the exception of interest on part of that sum) and, as I have already said, I have not been referred to any case—neither have I found one—to support the suggestion that the effect of these agreements was to give the company a share of the profits with a ceiling.

In the result, having considered all the arguments advanced to me and the many cases cited, I have come to the conclusion that the answer to the question asked by the Special Commissioners should be that their conclusion set out in sub-paragraph 6 of paragraph 22 of the case was erroneous in holding that the two sums of £105,350 and £80,000 fell to be included as receipts of the company's trade or business in computing its profits for assessments to excess profits tax.

As to the interest on the £21,000, I do not think that this could be held to be income from an investment. In *Inland Revenue Commissioners v. Desoutter Bros. Ltd.* (2), Lord Greene M.R. said that the word " invest- " ment " is not a word of art but has to be interpreted in a popular sense. No business man would look on this interest as received from an investment. I do not think that the man in the street would so consider it. In my opinion the interest on the sum of £21,000 must be included as receipts of the trade or business, and is subject to assessment. That part of the question which relates to the interest will be answered accordingly.

Since the appellants have succeeded on the main part of the case they are entitled to their costs.

(1) (1935) 20 Tax Cases 79 (2) [1946] 1 All E.R. 58, 61.

The Crown appealed to the Court of Appeal.

Harrison K.C. and *Lowry* for the Crown. Consideration for the sale of a capital asset is not necessarily, nor even prima facie, capital: *Chadwick v. Pearl Life Insurance Co.* (1). In each case it is for the court to investigate the real nature of the contract: there is no fixed rule for dealing with these cases: *Jones v. Commissioners of Inland Revenue* (2); *Commissioners of Inland Revenue v. Ramsay* (3). Consideration may be income even where the parties call it capital: *Wesleyan & General Assurance Society v. Inland Revenue Commissioners* (4); *Rustproof Metal Window Co. Ltd. v. Inland Revenue Commissioners* (5); *British Insulated & Helsby Cables Ltd. v. Atherton* (6).

Where there is a joint venture in which one party contributes capital and other contributes land, plant, goods or services, and the consideration is a division of a pool of profits, when ascertained, the parties cannot make that pool capital by calling it capital: *British Sugar Manufacturers Ltd. v. Harris* (7). The rights of the parties can only be determined by the terms of the documents and not by their performance under them. *Mackintosh v. Commissioners of Inland Revenue* (8) gives a good example of a transaction which could be said to have been very like a sale.

If there be any doubt from a purely legal point of view as to whether a particular payment has the accountancy quality of a capital payment or an income payment, then the opinion of the Special Commissioners should weigh in the balance: *Cooper v. Stubbs* (9). The finding of the Commissioners should stand provided they had before them evidence on which to arrive at such a finding and providing they did not misdirect themselves: *Inland Revenue Commissioners v.*

(1) [1905] 2 K.B. 507.
(2) [1920] 1 K.B. 711.
(3) (1935) 20 Tax Cases 79.
(4) [1946] 2 All E.R. 749; [1948] 1 All E.R. 555.
(5) [1947] 2 All E.R. 454.
(6) [1926] A.C. 205.
(7) [1938] 2 K.B. 220.
(8) (1928) 14 Tax Cases 15.
(9) [1925] 2 K.B. 753.

Lysaght (1) ; *Inland Revenue Commissioners v. Electrical and Musical Industries Ltd.* (2).

It does not follow from the relationship of master and servant that all inventions by the servant conceived or made in the master's time become the property of the master. It depends on the express or implied terms of the contract of employment. *Emerson v. Hearty and Morgan* (3) was also cited.

Patton K.C., Nicholson K.C. and *Gibson* for the company. The company sold their rights in the plough patent when they accepted from Ferguson the promise to pay a sum of money. The sum was the capital value of the patent. The agreement of 1923 constituted a mortgage of the patent and afterwards the only interest of the company was as mortgagor. Even if the Special Commissioners were right in holding that the payents were profits, they were not profits of a trade or business : *Inland Revenue Commissioners v. Descuiter Bros. Ltd.* (4). Because money is an income of a trading company it does not necessarily mean that it is a profit of the trade or business. It was no part of the company's business to develop patents.

Where a servant perfects a patent in the course of his employment the patent is the property of the master : *Worthington PumpingEngine Co. v. Moore* (5) ; *Triplex Safety Glass Co. v. Scorah* (6). Ferguson was managing director of the company and therefore a servant : *British Celanese Ltd. v. Moncrieff* (7). The object of the first agreement was to resolve a dispute as to the ownership of the patent. It is absurd to suggest that Ferguson abandoned his interest : what happened was that the company gave up its claim as Ferguson's employer in consideration of a contingent debt, together with a new interest in the patents, i.e., the interest of a person who is given something for the purpose of securing a debt. The consideration which the company received for the sale of that capital asset was itself capital.

(1) [1928] A.C. 234.
(2) [1949] 1 All E.R. 120.
(3) [1946] N.I. 35.
(4) [1945] 2 All E.R. 532 ; [1946] 1 All E.R. 58.
(5) (1902) 20 R.P. Ch. 41.
(6) [1938] Ch. 211.
(7) [1948] Ch. 564.

It is obvious that in some cases the profit of the sale of a patent may be an income profit,e.g., where a company specialises in buying and selling patents. There have been a number of decisions on this question of dealing in patents : *Commissioners of Inland Revenue v. British Salmson Aero Engines, Ltd.* (1) ; *Desoutter Bros. Ltd. v. J. E. Hanger & Co. Ltd. and Artificial Limb Manufacturers Ltd.* (2) ; *Withers (H.M. Inspector of Taxes) v. Nethersole* (3).

The 1923 agreement is conclusive to show that the company gave up and assigned what rights it had in the patents even though it may leave undecided what rights the company got in exchange : *Rustproof Metal Window Co. Ltd. v. Inland Revenue Commissioners* (4) ; *Tootal Broadhurst Lee Co. Ltd. v. Inland Revenue Commissioners* (5). In the *Tootal* case (6) the taxpayer was carrying on the business of an inventor. In the present case the invention was accidental as regards the company : *Commissioners of Inland Revenue v. Sangster* (7).

The document must be read in the light of all the surrounding circumstances. The fact that the 1927 agreement refers to "income" does not necessarily mean that what is referred to is in fact income. In *Jones v. Commissioners of Inland Revenue* (8) it was held that payments were income for the reason that they rose or fell according to the business, but that is not what happened here.

If the Crown is to succeed it must show (*a*) that the payments were income and not capital, and (*b*) that if the payments were income then they were in the nature of profits arising from the company's trade or business, and not income from investment : *Margerison v. Tyresoles Ltd.* (9).

Cur. adv. vult.

(1) 1938, 2 K.B. 482.
(2) 1936] 1 All E.R. 535.
(3) 1948] 1 All E.R. 400.
(4) 1947 2 All E.R. 454.
(5) 1947] 2 All E.R. 409 ; 1949 1 All E.R. 261.
(6) 1949] 1 All E.R. 261.
(7) [1920, 1 K.B. 587.
(8) [1920] 1 K.B. 711.
(9) (1942) 25 Tax Cases 59.

The judgment of the court was delivered by LORD MACDERMOTT C.J. :

This appeal relates to certain assessments to excess profits tax made upon Harry Ferguson (Motors) Limited (hereinafter called "the company") for the accounting periods ending March 31 in each of the years 1940 to 1945, both inclusive.

The question now at issue does not involve any detailed consideration of the several assessments. Shortly stated it is whether certain sums received by the company under three agreements made between it and Mr. Harry Ferguson fell to be included as receipts of the company's trade or business in computing its profits for the purpose of assessment to this tax. The agreements mentioned were made on the following dates: the first on November 30, 1923, the second on April 27, 1927, and the third on December 2, 1935. Under the first and second agreements the company received from time to time sums aggregating £105,350 together with interest at 7½ per cent. on £21,000 part of that amount. Under the third agreement the company received in the aggregate a further £80,000.

The Special Commissioners held that all these sums, together with the interest on the £21,000, should be included as receipts of the company's trade or business in reckoning its profits for the purposes of the tax. On appeal Sheil J. took the contrary view, except as regards the interest on the £21,000. Agreeing with the Special Commissioners as to that item he held that it could not be excluded, as income from an investment, under paragraph 6 (1) of the Seventh Schedule to the Finance Act (No. 2), 1939, and must, therefore, be included in the computation of profits. The Crown now seeks to restore the decision of the Special Commissioners as to the payments making up the said sums of £105,350 and £80,000. The company has not appealed in respect of the interest on the sum of £21,000.

The case stated sets out the terms of the three agreements and contains a careful and detailed account of the surrounding facts and circumstances as proved before the Special Commissioners. It is unnecessary

to encumber this judgment by restating the facts fully, but a reference to the salient features of the situation which produced the agreements must be made if the contentions of the parties and the substance of the dispute between them are to be appreciated.

During the first World War Mr. Harry Ferguson, then managing director of the company, conceived the idea of a new type of mechanical plough (hereinafter called " the plough "). He set to work on this, using the company's premises, time and materials, and having the assistance of some of the company's staff. By 1918 he had taken out two patents in connection with the plough in his own name. On September 13, 1918, he entered into two agreements with the company whereby he agreed to hold the patents in trust for it for a period of two years. Pursuant to these agreements the company tried to exploit the patents. It manufactured some ploughs and endeavoured to sell them; but the machines were imperfect, losses were incurred and in 1922 or thereabouts manufacture by the company ceased and has not been resumed since, save for the making of a new prototype in 1934. Apart from these limited manufacturing activities the company has manufactured nothing. It is a private company and, as the Special Commissioners have found, its business consists " chiefly of merchanting " and repairing motor vehicles and their accessories " and mechanically drawn agricultural implements " and machinery."

Mr. Ferguson continued to experiment, and by 1921 had taken out further patents in his own name in respect of the plough. On October 18 of that year there was a meeting of directors of the company. The agreements of 1918 had by that time expired and it was resolved: " that the necessity of new agreements " between Mr. Ferguson and the company would have " to be considered in conjunction with the Company's " Solicitor. . . ." Negotiations for a new agreement then began and, after protracted discussions, resulted in the said agreement of November 30, 1923 (hereinafter referred to as " the first agreement "). It is

abundantly clear that this agreement was entered into with a view to composing a vigorously contested dispute that had arisen between the company and Mr. Ferguson regarding the plough, and that the substance of this difference related to their respective rights in the patents which Mr. Ferguson had taken out and in the profits which might accrue from the sales of the plough. Mr. Ferguson was still devoting himself to the development of his invention and there was a prospect of its eventual commercial success. He certainly was not content that the full reward of his inventive work should be reaped by the company. It, on the other hand, regarded the plough as an asset and was in no mind to let the expense it had incurred and the facilities it had provided in relation thereto go for nothing. It is also clear that at this stage each of the negotiating parties realised that without the other the chances of perfecting the invention and exploiting it to advantage would, to say the least, be much diminished. For Mr. Ferguson the company's continued financial support was obviously of importance. For the company it was no less important that Mr. Ferguson's talents and energies should continue to be devoted to the plough. The company's viewpoint at this period may be taken as reflected in the following excerpt from the Minutes of a meeting of directors held on December 12, 1922 :—" The Ferguson " plough being the company's greatest asset, Mr. " Ferguson's presence in all its stages of manufacture, " distribution and sale was a vital necessity in view of " the specialised nature of the plough and the necessity " of being absolutely certain that nothing should be " allowed to jeopardise its most successful marketing."

Reference must now be made to the leading features of the three agreements which arose out of the situation thus briefly described. The first agreement, after mentioning Mr. Ferguson's invention and the patents already secured or applied for by him, proceeds :— " AND WHEREAS the Company has from time to time " permitted the said Harry Ferguson to utilise his time " and talents at the Company's expense in relation to " said Plough and patents and has otherwise assisted

" and facilitated the said Harry Ferguson in connection " with the Plough and patents AND WHEREAS the " said Harry Ferguson has entered into certain agree- " ments for the manufacture and marketing of the " Plough AND WHEREAS the parties hereto are " desirous of making provision for remunerating the " Company for its services and assistance as aforesaid." The next recital contains the statement that: " the " said Harry Ferguson has for the consideration herein " referred to agreed to pay to Harry Ferguson Limited " One hundred and five thousand three hundred and " fifty pounds as herein provided." By clause 1 Mr. Ferguson is to: " continue the manufacture and " marketing of the Plough either through agents or " otherwise as he may determine "; to keep proper records of the profits and to make monthly returns to company giving full particulars as to the manufacture and marketing. By clause 2 Mr. Ferguson is to be entitled to receive " a salary " of from £1,000 to £1,200 per annum. After payment of such salary and of expenses out of the plough receipts or earnings the profits from the plough are to be applied thus:—The company is to be paid 90 per cent. of the profits and Mr. Ferguson is to be paid the remaining 10 per cent. until the payments to the company amount to £21,000 with interest thereon at 7½ per cent.; the profits are then to be divided equally until the company has received the full sum of £105,350 in addition to interest as aforesaid; thereafter all the profits are to go to Mr. Ferguson. By clause 3 the profits referred to are to include all profits arising from the plough and from the existing and any future patents taken out by Mr. Ferguson, and also the profits from any plough invented or to be invented by Mr. Ferguson. By clause 4 the payments to the company are to be made monthly. By clause 5 Mr. Ferguson undertakes not to " mortgage, charge or pledge his interest in the " subject matter of this agreement " or dispose of the same by sale or otherwise without the consent of the company until the moneys payable to the company have been fully discharged. By clause 6 Mr. Ferguson

agrees to use his best endeavours to expedite "the "repayment to the company as soon as possible of all "moneys payable to the company." And by clause 7 the agreement is to operate as from September 30, 1923.

Pursuant to clause 1 Mr. Ferguson continued the manufacture and marketing of the plough, principally in the United States of America. Though they do not appear to have been large compared with the substantial sums reached in later years, profits were made and Mr. Ferguson began to pay sums to the company in accordance with the terms of the first agreement. Then on April 27, 1927, the company and Mr. Ferguson entered into what will hereinafter be called "the "second agreement." It is expressed to be supplemental to the first agreement. It recites that questions have arisen between the parties as to the construction of the plough agreement (i.e., the first agreement) "and as to the ownership of the plough patents therein "referred to." and that "in order to dispose of such "questions the said parties have agreed to enter into "these presents." Clause 1 reads thus:—"The said "Harry Ferguson stands possessed of the Plough "patents in trust for the Company as from 30th "September, 1923, until the Company shall have "received as income therefrom a sum of £105,350 "and interest as provided in the Plough agreement." Clause 2 provides, in terms which need not be detailed, for the future remuneration of Mr. Ferguson (in addition to his salary under the first agreement) in consideration "of the services already given by the "said Harry Ferguson in connection with the Plough "patents and the Manufacture and Sale of the Plough "in the United States of America and elsewhere and "the further services to be hereafter given by him in "connection therewith." Clause 3 provides that when the company shall have received the said sum of £105,350 and interest on the £21,000 it "shall transfer "release and make over to the said Harry Ferguson "absolutely all the interest of the Company in the "said Plough patents." By clause 4 the [illegible] "undertakes not to "mortgage charge or pledge its "interest in the subject matter of this agreement or

"dispose by sale or otherwise of its said interest" without Mr. Ferguson's consent. And clause 6 says that "as amended by these presents the Plough agree-"ment shall continue in full force and effect."

After this Mr. Ferguson continued making and merchanting the plough. Then, on December 2, 1935, he entered into a further agreement with the company. This will be referred to as "the third agreement." It is expressed to be supplemental to the first and second agreements and by it Mr. Ferguson agrees, "in con-"sideration of further services afforded and rendered "by the Company" to him, to pay the company a further sum of £80,000 over and above the sums payable under the first and second agreements. Following this agreement, Mr. Ferguson continued his activities in connection with the plough, the profits increased and Mr. Ferguson in due course discharged all his obligations to the company under the three agreements. The course pursued while this was being done appears from the case stated to have been as follows:—Mr. Ferguson remitted the profits to the company in the first instance, the company retained thereout the sums payable to it under the agreements and paid over the balance to Mr. Ferguson, the process continuing until the said amounts of £105,350 and £80,000 (together with interest on the said sum of £21,000, part of the said £105,350) had been paid off.

Apart from several subsidiary questions, which will be noticed later, the main issue for decision is, as it has been throughout this litigation, whether the payments received by the company under the three agreements (other than the interest on the £21,000) were payments of income or capital. The company contended that what the agreements really effected was the sale by the company to Mr. Ferguson of a capital asset, i.e., all such interest as the company had or claimed to have in the plough patents; that the consideration or price therefor was the sum of £185,350, or alternatively, the sum of £105,350 mentioned in the first agreement; and that the payments in question were instalments of the price and therefore capital and

not income. The Crown, on the other hand submitted that on their true construction the agreements provided not for a sale but for a sharing of profits from a commercial venture, and that the payments received by the company were received as income and not as capital.

The main issue may be narrowed in several respects. In the first place, whatever the nature of the payments made to the company under the first and second agreements may be, we are unable to relate the £80,000 payable under the third agreement to any capital transaction. It was suggested that this sum might be treated as an agreed addition to the price. But even on the hypothesis that the first agreement amounted to a contract of sale we can find no justification, either in the terms of the third agreement or in any of the facts and findings of the case, for regarding the £80,000 as part of the price. The consideration for the payment of that sum is expressly stated to be "services afforded and rendered by said Harry Ferguson "Ltd., to said Harry Ferguson" and it was conceded before us that these words were capable of referring to services such as those rendered by the company in the manufacture in 1934 of a new prototype as already mentioned. We think these words must be read in their natural and ordinary meaning and as referring to services rendered by the company in the course of its business; and so regarding them we are of opinion that the receipts making up this sum of £80,000 must be considered as income and not as capital in the company's hands. In the second place, we agree with the Special Commissioners that if the £105,350 was the consideration for the sale of a capital asset the sums of which it is made up should be regarded as payments of capital and not as income. Though the Crown was not disposed to acquiesce in this view we can see no convincing reason for any other conclusion on the facts of the present case. And conversely, if the payments in question were not the consideration for the sale of a capital asset we think, again having regard to the facts of the case, that they must be taken as income in the hands of the company. The view that these payments might be considered as made in

liquidation of an antecedent debt, though mentioned in the course of the hearing, was but faintly argued and we do not think it can be sustained. The company and Mr. Ferguson were at issue as to their respective rights and obligations and the agreements were obviously conceived and drafted with a view to determining their rights in future profits rather than of settling some already existing debt. There is, it is true, some indication that the sum of £21,000, in respect of which interest was payable, was a rough measure of the company's expenditure in connection with the plough. But no attempt was made on behalf of the company to contend that this sum stands in a category by itself or in any different position from the remainder of the £105,350 as far as this appeal is concerned.

The main issue accordingly comes to this: Was the sum of £105,350 payable by Mr. Ferguson as the purchase price of such interest as the company had or claimed to have in the plough patents?

During the debate many cases were cited in which a decision was reached as to whether particular payments were capital or income. We do not propose to review these authorities. They set up no conclusive test of general applicability, and it is fruitless to argue from the facts of one instance to the differing facts of another. There is, so far as we are aware, no single, infallible test for settling the vexed question whether a receipt is of an income or capital nature. Each case must depend upon its particular facts and what may have weight in one set of circumstances may have little weight in another. Thus, the use of the words "income" and "capital" are not necessarily conclusive; what is paid out of profits may not always be income; and what is paid as consideration for a capital asset may, on occasion, be received as income. One has to look to all the relevant circumstances and reach a conclusion according to their general tenor and combined effect.

Both the Special Commissioners and Sheil J. approached this problem by inquiring as to where the

beneficial ownership in the plough patents lay prior to the first agreement, and they arrived at different conclusions. The Special Commissioners, after referring to the 1918 agreements, said : " it appears to us that " the result of the expiration of the agreements must " have been that the exclusive beneficial ownership " in the patents then reverted to Mr. Ferguson, and " the right of the Company to use them in its business " came to an end, unless and until some new agreement " was entered into." Sheil J. rejected this view and, after citing *Worthington Pumping Engine Co. v. Moore* (1), and *Triplex Safety Glass Co. v. Scorah* (2), said : " Where, as here, the employee was not in a " subordinate position but was managing director of " the company and the circumstances were such as " those already noticed with the addition that the " employee, by reason of his status with the company " could direct both labour and materials I am of " opinion that the company could successfully have " maintained an action claiming the beneficial interest " in such invention or discovery."

We do not think this was the right approach. In our opinion the materials available were insufficient to ground any firm finding one way or the other in regard to the ownership of the patents prior to the first agreement. Moreover, a decision on this preliminary point was, we think, unnecessary for the ascertainment of the true nature of the payments received by the company, and fruitless as well. The first and subsequent agreements under which these payments were made did not rest on the acceptance of one view or the other as to the beneficial interest in the patents. Instead of determining their respective claims to ownership, the paramount object of the contracting parties, as already observed, was undoubtedly to compromise those claims by means of a working arrangement designed to confer benefits upon both. The true issue turns on the character of this compromise and not on the validity of the conflicting claims which produced it. This, of course, is not to say that there could have been no compromise by way

(1) (1902) 19 T.L.R. 84. (2) [1938] Ch. 211.

of sale. But whether that was the nature of the settlement must, in the circumstances, depend on what was agreed and not on a finding as to whether or not the company had something to sell.

After a careful consideration of the arguments addressed to us we have come to the conclusion that the view ultimately reached by the Special Commissioners was right and that the transaction evidenced by the first and second agreements the third may be left out of account for the reasons stated earlier—was not a sale to Mr. Ferguson by the company of such interest as it claimed in the patents.

It must first be observed that the case for a sale rides most uneasily on the language of the agreements which were conceded to be genuine documents and not intended to mislead. They make no mention of a sale from start to finish. The recitals contain nothing to indicate that the parties were contemplating the relationship of vendor and purchaser. The expressed purpose, or at any rate, one of the expressed purposes, is to remunerate the company for its services and assistance. There is no allocation of payments as between that purpose and a purchase of the company's rights. The so-called price is nowhere so described and it is only a lump sum in the sense that a figure is stated. But whether that figure becomes payable depends entirely on the making and volume of profits. However optimistic the parties may have been the amount of profits to be anticipated could not be regarded as anything but problematical. Quite conceivably some other inventor might, within a few years, have produced a machine so much more efficient and economical than Mr. Ferguson's plough as to destroy all possibility of £185,350 ever being earned from Mr. Ferguson's inventions. Moreover, the agreements themselves refer to the payments to be received by the company from the patents as "income therefrom". In short, we think it fair to say that the form of these agreements and their general tenor point away from and not towards a transaction of sale. The company's case was put in two ways—(i) the interest sold passed

to Mr. Ferguson on the execution of the first agreement, so that thereafter he was exploiting his own patents and paying the purchase price by instalments out of his own profits; and (ii) alternatively, the interest sold passed to Mr. Ferguson when the price was completely paid. Of these submissions the first, which was that most stressed on behalf of the company, appears to us untenable, if for no other reason because it is irreconcilable with the terms of the second agreement. All the relevant payments were made subsequent to the second agreement and it is impossible to reach a decision on this point merely by reference to the first agreement. The effect of the second agreement must also be considered and it not only recites a dispute as to the ownership of the patents, but provides that until the £105,350 and interest shall be received by the company, Mr. Ferguson is to hold the patents in trust for the company, and, further, that when the company has received such payment it is to make over all its interest in the patents to Mr. Ferguson absolutely. The trust thus declared does not seem to have been intended to work any alteration in the division of profits previously agreed. Counsel on both sides suggested that its object was to afford the company some measure of security for the payments it hoped to get but, however that may be, we think it is plain enough, after the first agreement had been modified to the extent specified in the second agreement, that the company was recognised as possessing a beneficial interest in the patents. And it will be remembered in this connection that, when the relevant payments came to be made, the course followed by Mr. Ferguson was to remit the net profits to the company which then divided the same in the stipulated proportions, a procedure that is entirely compatible with the view that the declaration of trust either created or acknowledged a beneficial interest in the company. These considerations indeed were used to support the alternative submission that what was sold was to pass to Mr. Ferguson when, and only when, the company had received the full amount payable to it. It seems to us, however, that the difficulties in the way of this

contention are substantial and sufficient to negative a sale of any sort. If, as we would hold, the company retained a beneficial interest by agreement in the patents while the payments were being made, it follows that the profits out of which the payments were to come cannot be regarded as belonging solely to Mr. Ferguson. The theory of a sale would be easier to support if the alleged price had to be found by the purchaser out of his own pocket. But the agreements place Mr. Ferguson under no obligation to pay anything if there are no profits and, once the company's first submission is out of the way, the profits from which the payments fall to be made are no longer his alone or subject to his unfettered control. In the light of the other considerations to which we have already referred, we are unable to regard as a sale a transaction in which the payments alleged to constitute the price derive, in part at least, from the continuing interest of the alleged vendor in what he is said to have sold. It seems to us that the first and second agreements were intended to compose the differences between the contracting parties in a manner which had nothing to say to the *sale* of any asset. We think that on their true construction the agreements provided for the future exploitation of the plough as a commercial profit-earning enterprise and for a division of the profits of this enterprise between the parties until the company's share of those profits had reached an agreed total.

For these reasons we are of opinion that the relevant payments were income and not capital in the hands of the company.

Two further questions remain and may be dealt with briefly.

In the first place it was said that if the payments were income they were not receipts of the company's trade or business and so were not to be reckoned in computing the company's liability to excess profits tax. We think this submission is without weight. It was common ground that the activities of the company germane to this appeal were within its powers and we

see no cause to doubt that, in entering into the agreements with Mr. Ferguson, it was engaging in the promotion of its trade or business. The income resulting from this ought, therefore, to be included in computing the profits in respect of which excess profits tax is payable.

Next, it was submitted that if the relevant payments, other than the interest on the £21,000, were income they were excluded from computation by virtue of paragraph 6 (1) of the Seventh Schedule to the Finance Act (No. 2), 1939, as being income from investments within the meaning of that enactment. We think this contention must fail having regard to the decision of the House of Lords in *Tootal Broadhurst Lee Co. Ltd. v. Inland Revenue Commissioners* (1). Looking at the matter, as we must, from the standpoint of a business man we think it impossible to regard the relevant payments in this case as income from an investment.

On these grounds we are of opinion that the decision of the Special Commissioners was right and that the question of law should be answered accordingly. The appeal will, therefore, be allowed with costs here and in the court below.

Appeal allowed.

Solicitor for the Crown : *F. C. MacNeice.*

Solicitors for the respondents : *J. C. Taylor & Co.*

S. M. M

(1) [1949] 1 All E.R. 261.

BLACK v. MITCHELL (1).

Highway—Obstruction—Sunblind with side panel—Wilful interruption of free passage—Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 Vict., c. 92), s. 13.

An obstruction which is temporary and trivial in extent may not be an illegal obstruction within the meaning of s. 13 of the Summary Jurisdiction (Ireland) Act, 1851, but it was *held* that the obstruction caused by the side panel of a sunblind which projected three feet across the footpath in front of a shop could not be regarded as trivial in extent, and the use of the blind for about four hours on every sunny day went beyond what could be regarded as merely temporary.

CASE STATED by the resident magistrate sitting at Omagh Petty Sessions.

The complainant and appellant, James Desmond Black, resided and carried on business at 24 High Street, Omagh, immediately adjoining the shop at 26 High Street, Omagh, at which the defendant and respondent, Robert Mitchell, carried on business. The entrance to the appellant's premises was on that side of his premises next to the respondent's shop. The respondent had a sunblind of the ordinary extension type which could be extended over the footpath in front of his shop, but at such a height from the ground as not to cause any obstruction. In addition the respondent was accustomed on sunny days to attach a side panel of canvas material in an upright position to this sunblind at the side of his shop next to the appellant's premises. The inner edge of the side panel was attached to the window frame of the shop and the top of the panel was attached to the metal frame of the sunblind, so that the panel extended outwards across the footpath. The width of the panel was two feet nine inches at a height of three feet from the ground and six feet at a height of six feet from the ground, that is to say, it extended across the footpath to a distance of two feet nine inches at three feet from the ground increasing to six feet at a height of six feet.

(1) [illegible] King's Bench Division before Porter and Black JJ. [illegible] Jan. 30 [illegible] 1951

On two occasions in May, 1950, the appellant had to go round this side panel several times when going out of his premises to proceed down the street past the respondent's shop, and similarly on returning. He accordingly instituted proceedings at petty sessions against the respondent by two summonses, charging him with having wilfully interrupted the free passage of the appellant on a public street on these two occasions by causing the side panel of the sunblind to be placed in such a position as to cause an obstruction contrary to s. 13 of the Summary Jurisdiction (Ireland) Act, 1851.

On the hearing of the summonses the learned resident magistrate held that the alleged obstruction was not of a substantial nature and was not calculated to cause an obstruction and he accordingly ordered that both cases be dismissed on the merits, but at the request of the appellant he stated this case for the opinion of the court as to whether on these facts he was right in law in dismissing the summonses.

Brown for the appellant. [He referred to *R. (Collins) v. Fermanagh JJ.* (1), *Lowdens v. Keaveney* (2), *Read v. Perrett* (3), *A.-G. v. Mayo C. C.* (4).]

Nicholson K.C. and *Moody* for the respondent. [They referred to *Dwyer v. Mansfield* (5), *R. v. Bartholomew* (6), *Harper v. Haden* (7), *Yeldham v. Carpenter* (8).]

Cur. adv. vult.

Black L.J. [delivering the judgment of the court stated the facts and continued]:

Section 13 (3) of the Summary Jurisdiction (Ireland) Act, 1851, enacts that any person who shall in any manner wilfully or by negligence or by misbehaviour prevent or interrupt the free passage of any person or

(1) (1883) 14 L.R. Ir. 50.
(2) [1903] 2 I.R. 82.
(3) (1876) L.R. 1 Ex.D. 349.
(4) [1902] 1 I.R. 13.
(5) [1946] 2 All E.R. 247
(6) [1908] 1 K.B. 554.
(7) [1933] Ch. 298.
(8) (1912) 46 I.L.T.R. 186.

carriage on any public road or street or crossing shall be liable to a fine not exceeding twenty shillings.

What is the extent of the interference with the free passage of a person along the footpath of a public street which would constitute an offence under this section? According to the judgments in the well-known case of *Lowdens v. Keaveney* (1), the obstruction contemplated by the section is such as would constitute an actionable nuisance at common law. The public are ordinarily entitled to use the whole width of the street for passing and repassing, and it is no defence to proceedings complaining of obstruction that sufficient available space for the use of the public is left. A shop-keeper is not entitled to erect a show-board prejecting from the front of his shop over the footpath which will interfere with the use by foot passengers of the full width of the footpath, *Read v. Perrett* (2). Nor is he entitled to use part of the foot-path in front of his shop to set out his wares for sale *R. (Collins) v. Fermanagh JJ.* (3). It is not, of course, every interference with the free passage of persons along a highway that will constitute an illegal obstruction. Pedestrians stopping on the footpath to look in at a shop window may prevent other passersby from using the whole width of the footpath. A vehicle stopped to deliver goods at a shop or warehouse may prevent other vehicles from using the whole width of the carriageway. Interferences such as these will not be deemed illegal so long as they are reasonable in extent and duration. The question of what will constitute an illegal obstruction has been discussed in many reported cases. I do not think it necessary to go through all the authorities which were cited during the argument. It will be sufficient to refer to a modern case *Harper v. Haden* (4), in which the principles regarding the matter are set out in the judgments of the English Court of Appeal. Lord Hanworth M.R. says: "These cases establish the following propositions:—

"1. A temporary obstruction to the use of the

(1) [1903] 2 I.R. 82.
(2) (1876) L.R. 1 Ex.D. 349
(3) (1883) 14 L.R. Ir. 50.
(4) [1933] Ch. 298, 304, 308.

" highway or to the enjoyment of adjoining premises
" does not give rise to a legal remedy where such
" obstruction is reasonable in quantum or duration.
" 2. If either of those limitations is exceeded so
" that a nuisance to the public is created the
" obstruction is wrongful."

And Lawrence L.J. refers to " certain well estab-
" lished principles which may shortly be summarised
" as follows :—

" A permanent obstruction erected in a highway
" without lawful authority is necessarily wrongful
" and constitutes a public nuisance at common law,
" as it in fact operates as a withdrawal of part of
" the highway from the public.
" A temporary obstruction of the highway may
" or may not constitute a public nuisance according
" to circumstances. As a general rule such an
" obstruction is wrongful and constitutes a public
" nuisance, unless it is negligible in point of time or
" authorized by Parliament or occasioned in the
" reasonable and lawful use of the highway as a
" highway."

In applying these tests it is obvious that the question whether a temporary obstruction of a highway is to be regarded as unlawful will often present itself as a question of degree. It is equally clear that some obstructions may be of such extent and duration as to be manifestly unlawful. The question in the present case is whether on the facts of the case it was open to the learned resident magistrate to hold that the obstruction caused by the side panel of the sunblind was of such a trivial nature or of such a temporary duration as not to amount to an unlawful obstruction of the footpath, according to the principles laid down in the authorities. On the facts set out in the case stated we are of opinion that it was not open to him so to hold. In our view the obstruction could not legitimately be held to be negligible or trivial in extent. At its minimum width the side panel projected about three feet across the footpath, no inconsiderable proportion of the width of the footpath of High Street in Omagh. While in position it was a much more serious

obstruction to the passage of pedestrians along the footpath than was the show board which was the subject matter of the proceedings in *Read v. Perrett* (1). Moreover, the statement in the case stated that on each of the material dates the complainant had to go round this side panel on several occasions to proceed down the street in an easterly direction when going out of his premises and similarly on returning cannot be treated otherwise than as a finding that a person was in fact obstructed in his legitimate use of the footpath on those dates. Nor in our opinion was the obstruction caused by the side panel an obstruction of temporary duration as that phrase is used in the authorities. The defendant's custom was to erect this side panel on sunny days and to allow it to remain in position (presumably continuously) for about four hours in the afternoon. So that during a spell of sunny weather it might be in position during the greater part of every afternoon for weeks on end. This is far beyond anything that is spoken of as "temporary" in the cases. In our view, therefore, the resident magistrate ought to have held the obstruction to have constituted an interruption of the free passage of the complainant within section 13 of the Summary Jurisdiction (Ireland) Act, 1851, and ought not to have dismissed the cases "on the merits."

We are not unaware that similar side panels attached to sunblinds are to be seen in practically every town and village in Northern Ireland. So too it is a widespread practice for shopkeepers such as greengrocers and hardware merchants to display their goods on the footpath in front of their shops. If the law was strictly enforced in every case we do not see how it could be successfully contended that such practices do not constitute an obstruction of the footpath, rendering the shopkeepers liable to proceedings under various statutory provisions such as section 13 of the Summary Jurisdiction (Ireland) Act, 1851, or section 72 of the Towns Improvement (Ireland) Act, 1854. But it is notorious that these statutory provisions are not enforced with strictness, and that proceedings are but

(1) (1876) L.R. 1 Ex.D. 349.

rarely brought either by the urban authorities or by private individuals. The display of goods in front of his shop or the attachment of a side panel to his sunblind may be a considerable advantage to a shopkeeper and perhaps, incidentally, to his customers. Such practices, if kept within reasonable bounds, are not likely to be regarded by the public as causing any great inconvenience, unless the street is a busy one or the footpath a narrow one. In the vast majority of cases the ordinary citizen would be apt to regard a strict enforcement of the statutory provisions as unneighbourly and unnecessary, and calculated to produce an amount of ill feeling out of all proportion to any good which might be achieved. Nevertheless, when the matter is brought before the court it is the duty of the court to pronounce on the legal position, and in my opinion the maintenance by the defendant in the present case of the side panel for the periods mentioned in the case stated constituted an interruption of the free passage of persons along the footpath, within the meaning of the section under which the prosecution was brought.

It is of course to be noted that in order to render the interruption of the free passage of a person on a street an offence under section 13 (3) of the Act of 1851 the interruption must be caused either wilfully or by negligence or by misbehaviour. Difficulty with regard to this may conceivably arise where the alleged obstruction is caused in the course of a user of a street as a highway. But in a case where the obstruction is caused by something being purposely erected across portion of the street such as the sunblind in the present case, there is no question but that the interruption of the free passage of persons along the street is caused wilfully within the meaning of the section. *Fearnley v. Ormsby* (1) ; *Lowdens v. Keaveney* (2) per Gibson J. at p. 91.

It appears from the case stated that an alternative defence was put forward that there was a limited dedication of the highway subject to the defendant's right to hang the side curtain on sunny afternoons.

(1) (1879) 4 C.P.D. 136. (2) [1903] 2 I.R. 82, 91.

Apparently the learned resident magistrate did not find it necessary to express any view on this issue nor does it appear from the case stated what evidence (if any) was adduced by the defendant in support of this contention.

We will remit the case to the resident magistrate, who will deal with this contention as he may find proper. We will answer the question submitted by him by saying that he was not correct in law in holding that the side panel did not constitute a wilful interruption of the free passage of the complainant on the public street. If he finds no support in the evidence for the defence based on the alleged limited dedication of the street, it will be his duty to find the offences proved, and it will then be for him to consider what course he ought to take having regard to his view of the circumstances of the case and what penalty (if any) he ought to impose.

Appeal allowed.

Solicitor for the appellant : *R. Black.*

Solicitors for the respondent : *Orr & Rountree.*

S. M. M.

In re PEARSON, ANDREWS & OTHERS v. ROYAL VICTORIA HOSPITAL & OTHERS (1).

Will—Health Services—Immediate gift to voluntary hospital—Testatrix dying before transfer of hospital—Vesting of gift—Health Services Act (Northern Ireland), 1948 (11 & 12 *Geo.* 6, *c.* 3), *ss.* 25 (1) & (6), 27 (9), 34 (1).

A testatrix who died in 1946 left her residuary estate on trust to be divided equally among five named charities of which four were voluntary hospitals which were subsequently transferred to the Northern Ireland Hospitals Authority under the terms of the Health Services Act (Northern Ireland), 1948, and placed under the control of management committees. A construction summons was taken out to determine which, if any, of the provisions of the Act relating to the vesting of property were applicable to the gifts to the hospitals.

Held, that as the will came into operation before the day appointed for the transfer of the hospitals to the Hospitals Authority ss. 27 (9) and 34 of the Act were inapplicable, and that accordingly the gifts should be transferred to the named hospitals and receipts obtained from the respective treasurers.

ORIGINATING SUMMONS.

The facts appear sufficiently in the judgment.

Nicholson K.C. and *Gibson* for the plaintiffs.

Lowry for the Attorney-General for Northern Ireland.

Bowman for the Trustees and for the Management Committee of the Forster Green Hospital.

MacDermott for the remaining defendants.

Cur. adv. vult.

CURRAN J.: By her will dated October 21, 1937, Annie Jane Pearson devised and bequeathed the residue of her estate to her executors upon trust to sell and realise the same as and when and under and subject to such conditions as they might think fit and to divide the proceeds of such sale and realisation in equal shares amongst the following five charities, that is to say, The Royal Victoria Hospital, Belfast; The Forster Green Hospital, Fortbreda, Belfast; The Belfast

(1) In the Chancery Division before Curran J.; June 4, 11, 1951

Hospital for Sick Children, Incorporated, Falls Road, Belfast ; The Ulster Hospital for Children and Women, Incorporated, Templemore Avenue, Belfast ; and The Homes for the Blind, Cliftonville, Belfast ; and testatrix declared that the receipt of the respective treasurers for the time being of the aforesaid charities should be a good and sufficient discharge to her executors. The testatrix subsequently executed two codicils to her said will which did not affect the foregoing provisions thereof. The testatrix died on February 2, 1946.

The executors still hold the said residuary estate and have taken out this originating summons to determine how the same should be dealt with having regard to the provisions of the Health Services Act (Northern Ireland), 1948. They also seek to have "the Homes for the Blind, Cliftonville" identified. It is conceded by all parties and I am satisfied that the bequest to the last mentioned charity is payable to the Belfast Society for Home Mission Work among the Blind.

With regard to the four hospitals referred to in the will, each of them was transferred to the Northern Ireland Hospital Authority on July 5, 1948, by virtue of the provisions of section 23 of the Health Services Act (Northern Ireland), 1948, and each is now under the control of a management committee constituted under the said Act.

In the case of *In re Hunter, Midland Bank, Executor and Trustee Co. Ltd. v. Attorney-General for Northern Ireland and Others* (1), I had occasion to consider the provisions of the Health Services Act (Northern Ireland), 1948, in relation to a gift of shares of residue to a hospital which had been transferred to the Northern Ireland Hospital Authority under the terms of the said Act. The will in that case was made and testator died, as in the present case, before the appointed day on which such transfer took place. I held, however, that as the will came into operation with respect to such gift after the appointed day, the gift vested in the management committee controlling the hospital in question by virtue of the provisions of section 27 (9)

(1) [1950] N.I. 187.

of the Act. In the present case I have to consider a testamentary gift where the will came into operation with respect to such gift before the appointed day. It is clear that section 27 (9) does not apply and, if the opinion I expressed in *In re Hunter* (1) was right, it follows that the other provisions of the Act have no application to the present case. I am accordingly of opinion that the executors should hand over the gifts of residue to the various hospitals named in the will. obtaining a receipt from the treasurer in each case, It has not been suggested that there is any practical difficulty in the way of adopting this course. As at present advised, my view is that in the hands of the governing body or trustees of each hospital, the subject matter of such gift will be an endowment within the meaning of section 25 of the Act. This fact does not appear to create any difficulty under the Act having regard to the fact that no day has yet been appointed on which endowments are to be transferred to the respective management committees.

Declaration accordingly.

Solicitor for the plaintiffs : *J. Malseed.*

Solicitor for the Attorney-General for Northern Ireland : *Malcolm B. Davidson.*

Solicitors for the Trustees and Management Committee of the Forster Green Hospital : *L'Estrange & Brett.*

Solicitors for the remaining defendants : *Johns, Elliott & Wallace ; C. & J. Black.*

J. P.

(1) [1950] N.I. 187.

McGREDY AND OTHERS v. COMMISSIONERS OF INLAND REVENUE (1).

Will—Construction—Residuary gift of real and personal estate to beneficiary on his attaining twenty-five—Gift over in the event of beneficiary dying under twenty-five—Whether interest vested or contingent.

A devise or bequest to a person "on his attaining" a certain age, or "if" or "when" or "as soon as" he attains such age prima facie confers a contingent interest only, but it is a settled rule of construction that where there is a gift over in the event of the person not attaining such age the primary gift will be construed so as to confer a vested interest liable to be divested in the event of death under that age. This rule of construction (the rule in *Edwards v. Hammond* 3 Lev. 132) applies equally to devises and bequests of legal or equitable interests in realty or personalty or mixed funds of realty and personalty.

The rule being a rule of construction may be negatived by the actual terms of the will, but though the reason commonly assigned as a justification of the rule is that the gift over shows that the primary beneficiary is intended to take all except what had been given to the person entitled to the gift over the rule will not at the present day be negatived merely by the fact that in a particular case there may be some disparity between the primary gift and the gift over.

Per Black L.J. When one finds a settled and clear rule of construction it must be applied in a case which clearly falls within its scope, and one cannot go behind the rule and resort to the doctrine which is said to be the basis on which the rule was originally rested.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts under s. 60 (7) of the Finance Act, 1948, and s. 149 of the Income Tax Act, 1918.

Samuel Davison McGredy, who died on November 11, 1934, leaving his widow, a son and two daughters him surviving, by his last will disposed of his residuary estate in the following terms :—

"6. I devise and bequeath to my Trustees my "business of Nurseryman and all capital assets and "property employed therein and all the rest residue "and remainder of my property real and personal

(1) In the King's Bench Division (Revenue) before Black L.J. July 19, Oct. 30, 1951.

" whatsoever and wheresoever situate upon trust " to discontinue or to carry on my said business at " their discretion so long as my son " [the appellant Samuel Darragh McGredy] " shall be under the age " of twenty-five years with full power to manage " same in all respects as to the amount of capital to " be employed therein or otherwise howsoever and " upon further trust to sell and convert the same into " money and to invest the proceeds after payment " of my debts funeral and testamentary expenses " and the legacies hereinbefore bequeathed and to " stand possessed of such investments upon trust to " pay one-half of the net income or profits thereof " up to but not exceeding seven hundred pounds " thereof in any one year to my said wife during her " widowhood until my said son shall attain the age " of twenty-five years and after my said son shall " attain that age to pay to my said wife during her " widowhood an annuity of two hundred and fifty " pounds and to pay the residue thereof to my said " son on his attaining that age for his own use " absolutely. . . .

" 8. If my said son shall die under the age of " twenty-five years the share of my estate herein- " before devised and bequeathed to him shall be " divided equally between my surviving children."

Samuel Darragh McGredy was born on January 12, 1932.

In computing the investment income of Samuel Darragh McGredy for the year 1947-48 for the purpose of assessing him to the Special Contribution under the provisions of Part V of the Finance Act, 1948, there was included all the income arising to the trustees from the residuary estate of his father in the year 1947-48 other than the £700 paid to the widow in that year under the provisions of the will. The basis of this computation was that on the true construction of the will of Samuel Davison McGredy the appellant Samuel Darragh McGredy took an immediate vested interest in his father's residuary estate, though liable to be divested in the event of his death under twenty-five. An assessment was made accordingly and the trustees

of the will were served with a notice as indirect contributors under the provisions of s. 60 (2) (*a*) of the Act of 1948.

Samuel Darragh McGredy and the trustees appealed against the assessment contending that it was based on wrong principle in that the interest which Samuel Darragh McGredy had under the will was only a contingent interest. The Special Commissioners confirmed the assessment but on the application of the appellants they stated this case for the opinion of the High Court.

Patton K.C., and *Little* for the appellant submitted that the gift was contingent, referring to *Leake v. Robinson* (1), *Walker v. Mower* (2), *In re Edwards* (3) and *Love v. Love* (4).

Harrison K.C. and *Lowry* for the respondents. The gift is conditional and is followed by a gift over. That is an important element, showing that the gift should be treated as vested subject to divesting: *Phipps v. Ackers* (5), *In re Heath* (6), and see *Packham v. Gregory* (7). The disposition of the intermediate interest is an indication of the testator's intention: *Lane v. Goudge* (8), *Minch v. Minch* (9). The presumption is in favour of early vesting of a residual gift: Jarman on Wills, 7th ed. 1392, 1394.

Patton K.C. in reply. The point of *Phipps v. Ackers* (5) was whether the legal principle applied to an equitable interest, and in *In re Heath* (6) the question was whether the same rule applied to personalty. I admit that it applies to both, but the question here is what exactly is the principle. Tindal C.J. in *Phipps v. Ackers* (5) lays it down that there must be first a disposal of an intermediate interest, and secondly a gift over of the same property. Here the gifts are not the same. The first gift is of the whole property,

(1) (1817) 2 Mer. 363.
(2) (1852) 16 Beav. 365.
(3) (1906) 1 Ch. 570.
(4) (1881) 7 L.R. Ir. 306.
(5) (1842) 9 Cl. & F. 583.
(6) (1936) Ch. 259.
(7) (1845) 4 Hare 396.
(8) (1803) 9 Ves. Jun. 225.
(9) (1923) 57 I.L.T.R. 135.

subject to an annuity of £250; but the remainder would be subject to the widow's right to £700, which only terminates when the son attains twenty-five, so the principle of *Phipps v. Ackers* (1) does not apply.

Cur. adv. vult.

BLACK L.J. [after referring to the facts and reading the relevant portions of the will continued]:

It is quite clear that a devise or bequest to a person on his attaining a certain age, or "if" or "when" or "as soon as" he attains a certain age, if standing alone without any modifying context and without any further disposition or provision in relation to the subject matter of the devise or bequest, will confer a contingent interest only. And a person reading the relevant provisions of Samuel Davison McGredy's will and construing them according to their natural meaning without the guidance of decided cases might readily come to the conclusion that the interest given by the will to Samuel Darragh McGredy in his father's residuary estate was merely a contingent interest depending on his living to attain the age of twenty-five. The respondents, however, contend that the gift over in the event of the appellant dying under the age of twenty-five years makes all the difference. They rely on what they submit is a settled rule of construction which will be found expressed in similar terms in all the text books that where property is devised or bequeathed to a person on his attaining a certain age, or "if" or "when" or "as soon as" he attains that age, and there is a gift over in the event of his failing to attain that age, the attainment of the specified age will be held not to be a condition precedent giving him only an interest contingent upon his attaining that age but to be a condition subsequent so that he will take a vested interest liable to be divested in the event of his death under that age. The rule goes back to *Edwards v. Hammond* (2). In the earlier authorities we find it applied to devises of real property. No doubt it came into existence because of the strict requirement of the common law that a contingent

(1) (1842) 9 Cl. & F. 583. (2) (1684) 3 Lev. 132.

remainder of an estate of freehold must have a particular estate to support it, with the consequence that such a remainder would fail unless it vested either during the continuance of the particular estate or else at the instant of its determination. In *Pearks v. Moseley* (1) Lord Selborne L.C., after referring to this rule of real property law that a contingent remainder must take effect at the time of the termination of a previous freehold estate, goes on to say: "In order "to avoid the manifest disappointment of the intention "of testators, and the destruction of a whole series of "limitations which might result from that rule, the "Courts have in some cases leant to what I may "describe as a rather violent and unnatural con"struction of words of contingency of this kind, and "have treated them as descriptive, not of a condition "upon which the property was to vest, but of a "condition subsequent, on non-fulfilment of which it "was to become divested." And after referring to a number of cases, including *Edwards v. Hammond* (2) and the later case of *Bromfield v. Crowder* (3), in which *Edwards v. Hammond* (2) was followed and applied, Lord Selborne goes on to say: "The rule of con"struction adopted in those authorities depends partly "upon the law as to contingent remainders, and partly "upon the principle that, as to real estate, the Courts "are always unwilling to hold the fee to be in abey"ance." A statement to the same effect as regards the derivation of the rule will be found in the judgment of Warrington L.J. in *In re Astor* (4).

A number of cases are to be found in the reports in which the rule of construction adopted in *Edwards v. Hammond* (2) was recognized and followed in the early years of the nineteenth century: *Bromfield v. Crowder* (3); *Doe d. Hunt v. Moore* (5) (in this case it is stated that *Bromfield v. Crowder* (3) was affirmed in the House of Lords); *Doe d. Roake v. Nowell* (6) affirmed in the House of Lords *sub nom. Randoll v. Doe d. Roake* (7). It would appear from Lord Brougham's observations

(1) (1881) 5 App. Cas. 714, 721.
(2) (1684) 3 Lev. 132.
(3) (1805) 1 Bos. & P. (N.R.) 313.
(4) [1922] 1 Ch. 364, 385.
(5) (1811) 14 East 601.
(6) (1813) 1 M. & S. 327.
(7) (1817) 5 Dow. 202.

in the House of Lords in *Phipps v. Ackers* (1) that there was considerable doubt in the profession regarding the soundness of the principle upon which these cases were decided. Especial doubt appears to have been engendered by the decision in *Doe d. Hunt v. Moore* (2). Accordingly, when *Phipps v. Ackers* (1) came before the House of Lords it was decided to take the opinion of the common law judges in order that *Doe d. Hunt v. Moore* (2) and *Bromfield v. Crowder* (3) and other cases of that class might be reviewed. In the result the House of Lords, accepting the opinion of the judges, decided to follow the previous decisions, and accordingly after *Phipps v. Ackers* (1) there could no longer be any doubt that the rule of construction adopted in *Edwards v. Hammond* (4) was authoritatively established at any rate as regards the construction of devises of real estate.

Though the rule originated because of the strict requirements of the common law regarding the limitation of legal estates, it was made quite clear by the speeches in the House of Lords in *Phipps v. Ackers* (1) that it was to be regarded as applicable also to equitable interests (see the observations of Lord Lyndhurst L.C. (5)). And it soon became apparent that the rule was not to be held to be confined to devises of real estate. Already in 1847 the editor of the fourth edition of Roper on Legacies (Vol. I. p. 571) referring to *Tapscott v. Newcombe* (6) felt able to say that it would seem that the same rule was applicable to a devise where real and personal estate was blended. In *Whitter v. Bremridge* (7)—a decision much relied upon in the respondents' argument in the present case—a testator left his residuary real and personal estate to trustees with power of sale and directed them to pay the said property and interest arising therefrom to his godson on his attaining the age of twenty-four years, with a limitation over in case of his not attaining that age or leaving male issue. Page Wood V.C., in a very short judgment, said that the case followed

(1) (1842) 9 Cl. & F. 583.
(2) (1811) 14 East 601.
(3) (1805) 1 Bos. & P. (N.R.) 313.
(4) (1684) 3 Lev. 132.
(5) (1842) 9 Cl. & F. 584, 594.
(6) (1842) 6 Jur. 755.
(7) (1866) L.R. 2 Eq. 736.

Phipps v. Ackers (1), and held that the godson was absolutely entitled to the testator's residuary estate liable to be divested in the events in the will mentioned. *Whitter v. Bremridge* (2), decided eighty-five years ago, is quoted in all the text books, and so far as I am aware its authority has never been questioned. I am accordingly of opinion that it must be regarded as established that the rule in *Edwards v. Hammond* (3) is applicable to a residuary devise and bequest of real and personal estate.

It is rather curious that there does not appear to be any reported decision until comparatively recently regarding the application of the rule to gifts of pure personalty, though over one hundred years ago in the fourth edition of Roper on Legacies (Vol. I. p. 571) the view had been expressed that there did not appear to be any reason why the rule should not be extended to personal property as well as to real if it were sound as applied to either description of property, and in successive editions of Jarman on Wills (6th ed. pp. 1377, 1399 and 1426, 7th ed. pp. 1351, 1372 and 1400) it had been assumed that the rule applied to bequests of pure personalty. In *In re Heath* (4), however, Farwell J., after reviewing the authorities, held the rule to be applicable to a gift of a pecuniary legacy. It may, therefore, be taken that the rule is not one peculiar to the law of real property but is a general rule of construction of wills applicable to gifts of all types of property both real and personal.

The rule, though so firmly settled and repeated in almost identical terms in all the text books, can hardly fail to strike one as a somewhat artificial and technical rule involving, to use Lord Selborne's words, a rather violent and unnatural construction of words of contingency. The justification of the rule put forward in the authorities is the doctrine mentioned in the opinion of the judges in *Phipps v. Ackers* (1) and repeated in subsequent cases, e.g., by Wigram, V.C., in *Bull v. Pritchard* (5), and by Turner L.J., in *Boulton v. Beard* (6), that from the existence of the devise over

(1) (1842) 9 Cl. & F. 583.
(2) (1866) L.R. 2 Eq. 736.
(3) (1684) 3 Lev. 132.
(4) [1936] Ch. 259.
(5) (1847) 5 Hare 567, 571.
(6) (1853) 3 De G., M. & G. 608, 613.

the courts discover an intention that the first devisee shall take all that the testator has to give except what he has given to the devisee over, an intestacy in the meantime not being intended, and that in order to give effect to that intention they hold, by force of the language of the will, that the first devise is not contingent but vested, subject to be divested upon the happening of the event upon which the property is given over. To some minds this reasoning may not appear entirely convincing. In *Phipps v. Ackers* (1) the judges in advising the House of Lords expressly stated (at p 591) that in view of the current of authority the question whether this doctrine was originally altogether satisfactory was a matter which they considered they need not discuss. Lord Brougham (2) interpreted this as meaning that they had a considerable doubt on the point, and went on to say that had the question been new and entire he himself would have held the decision in *Doe d. Hunt v. Moore* (3) to be erroneous. But whatever doubts one may have about the soundness of the reasoning on which the rule has been sought to be justified, there can be no doubt that the rule itself, as now enunciated in all the text books, must, for good or for evil, be accepted as a settled rule of construction binding on our courts.

The rule, however, is only a rule of construction, and accordingly its application to any particular will may be negatived by the actual terms of that will. We must, therefore, examine Samuel Davison McGredy's will to see if there is anything contained in it to negative the application of the rule. There is clearly a devise and bequest of the residuary estate to the appellant, Samuel Darragh McGredy, on his attaining twenty-five (subject, of course, to the annuity of £250 to the testator's widow) with a limitation over in the event of Samuel Darragh McGredy dying under that age. But it is argued that the rule should not be held to be applicable in the present case. It is alleged that on the wording of the will Samuel Darragh McGredy is not to take all except what is given to the devisees over. Whether or not this premiss is sound is a

(1) (1842) 9 Cl. & F. 583, 591.
(2) (1842) 9 Cl. & F. 583, 596.
(3) (1811) 14 East 601.

question which I do not propose to discuss. For the argument sought to be based on it is, in my view, clearly unsound. The argument derives not from the rule itself, as now accepted and as laid down in all the modern text books, but from the principle alleged in the cases as the logical justification of the rule. Whatever its origin and whatever its justification the rule itself is in my opinion, firmly established as a rule of construction. When one finds a settled and clear rule of construction of this kind, the logical basis of which is dubious but which has been followed by the courts for a long period of years, I conceive it to be one's duty to follow the rule in a case which clearly falls within its scope. In my opinion it would simply lead to confusion to bypass the rule in a particular case, such as the present, which fell clearly within the rule as now accepted and within its wording as enunciated in all the text books, and to hold that the case was to be determined, not by applying the rule itself, but by going behind it and resorting to the doctrine which is said to be the basis on which the rule was originally rested, but which the judges who advised the House of Lords in *Phipps v. Ackers* (1) apparently regarded with dubiety, and which Lord Brougham clearly believed to be unsound and unsatisfactory (2).

I therefore find nothing in clauses 6 and 8 of Samuel Davison McGredy's will to negative the application of the rule in *Edwards v. Hammond* (3) to the gift of residue to the appellant, Samuel Darragh McGredy, on his attaining the age of twenty-five. Nor do I find anything in the other provisions of the will to suggest that the rule should not apply to this gift. I am, accordingly, of opinion that the decision of the Special Commissioners was correct, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants : *Carson, Baillie, Johnston & Thom.*

Solicitor for the respondents : *F. C. MacNeice.*

J. P.

(1) (1842) 9 Cl. & F. 583, 591.
(2) Ibid. 596.
(3) (1684) 3 Lev. 132.

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s. 57. The Vagrancy Act, 1824, as amended by the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, imposes penalties on every person playing or betting by way of wagering or gaming " in any street, " road, highway or other public place " or in any place to which the public " have or are permitted to have access." *Held* by the Court of Appeal (Andrews L.C.J. and Black L.J., Porter L.J. dissenting) that private places to which the public have in fact gone without the permission or acquiescence of the owner are not within the meaning of the words " any place to which the " public have or are permitted to have " access." *Walshe v. Taggart* [C.A. 1

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—— —— *Capital or income.* The managing director of a company having made inventions and taken out patents in his own name in relation to a plough entered into agreements with the company under which the company received payments out of the profits which the managing director made from exploiting the patents. The company submitted that the sums received under these agreements were payments for the sale of the capital asset of the company's interest in the patents, but the Crown contended that the sums were a share of profits from a commercial venture and were therefore liable to assessment for excess profits tax. *Held*, that on the true construction of the agreements the payments were income and liable to assessment. There is no single test for determining whether a receipt is of an income or capital nature. The use of the words "income" or "capital" in the agreement under which the payment is received s not necessarily conclusive. What is paid out of profits may not be income; and what is paid as consideration for a capital asset may be received as income. All the relevant circumstances must be considered and the conclusion reached according to their general tenor and combined effect. Decision of Sheil J. reversed. *Harry Ferguson (Motors) Ltd. v. Commissioners of Inland Revenue* [C.A. 115

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to be divested in the event of death under that age. This rule of construction (the rule in *Edwards v. Hammond* 3 Lev. 132) applies equally to devises and bequests of legal or equitable interests in realty or personalty or mixed funds of realty and personalty. The rule being a rule of construction may be negatived by the actual terms of the will, but though the reason commonly assigned as a justification of the rule is that the gift over shows that the primary beneficiary is intended to take all except what has been given to the person entitled to the gift over, the rule will not at the present day be negatived merely by the fact that in a particular case there may be some disparity between the primary gift and the gift over. *McGredy & Others v. Inland Revenue Commissioners* .. .. [K.B.D. (Revenue) 155

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